88-152

NO.

In the Supreme Court of the United States

IN RE: All American Services, Ltd.,

Petitioner

PETITION FOR A WRIT OF MANDAMUS

CHRIS J. ROY
(A LAW CORPORATION)
711 Washington Street
Alexandria, Louisiana 71301
Telephone: (318) 487-9537

ATTORNEY FOR PETITIONER,
ALL AMERICAN SERVICES, LTD.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

I. Whether the court of appeals can impose the sanction of dismissal for procedural violations upon one appellant without applying sanctions to another appellant equally in default?

II. Whether the *Federal Rules of Appellate Procedure* require that multiple appellants all share equally in transcript costs or have their appeals dismissed.

III. Whether a dismissal of an appeal by a court of appeals for a procedural violation from which no prejudice has resulted is permissible when the dismissal is in conflict with the same court's rule that no procedural dismissal shall occur absent prejudice to other parties involved.

LIST OF PARTIES TO PROCEEDING

PLAINTIFFS-CROSS APPELLANTS

Edward C. Abell, Jr., and
Carey Walton, individually and
as representatives of a class of
Revenue Bond purchasers.

DEFENDANT-APPELLANTS

Joe E. Fryar
Wright, Lindsay & Jennings
Valley Forge Insurance Company
All American Services Company, Ltd. (Petitioner)

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OPINIONS BELOW

The Judgment of the United States District Court for the Western District of Louisiana, Lafayette Division is unreported and is included in the appendix at A-1. The Order of Dismissal by the Clerk of the United States Court of Appeals for the Fifth Circuit is unreported and is included in the appendix at A-5 to A-7. The Orders of the United States Court of Appeals for the Fifth Circuit denying reinstatement of Petitioner's appeal are unreported and are included in the appendix at A-8 and A-9.

JURISDICTION

The Order of the Clerk of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's appeal from the Judgment of the United States District for the Western District of Louisiana was entered on August 19, 1987. The Order of the court of appeals denying Petitioner's motion for reinstatement, Johnson, J. was entered December 19, 1987. The Order of the court of appeals sitting in panel denying Petitioner's motion for reinstatement was entered February 5, 1988. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1651.

STATUTES AND RULES INVOLVED

STATEMENT OF THE CASE

Judgment was entered against the defendants-

-Petitioner; Fryar; Wright, Lindsay & Jennings (hereinafter referred to as WLJ); and Valley Forge Insurance Company--upon a jury verdict. At the time, WLJ and Valley Forge had the same counsel, while Petitioner and Fryar each had separate counsel. Judgment against Petitioner individually or jointly with other defendants was in excess of $10,000,000. Timely notices of appeal were filed by defendants.

Substantial error has been alleged, including the fact that the trial court permitted a tampered jury to remain seated and to render the verdict. Plaintiff/appellees cross appealed, seeking a higher award.

Transcript orders were filed by counsel for Fryar and WLJ ordering transcripts and indicating that payment arrangements had been made (A-17 & A-19). Petitioner's counsel filed a transcript order on May 6, 1987, stating that no transcript was necessary and indicating that payments were to be apportioned among the "four defendants" (A-21). Two days later, on May 8, 1987, counsel for Petitioner informed the reporter that he would borrow a transcript copy in lieu of ordering one. The Clerk approved so long as the other defendants knew they were bearing the cost (A-23). Following the filing of the transcript orders, but before the dismissal at issue, Valley Forge retained its own separate counsel.

On May 21, 1987, counsel for Fryar informed the Clerk that Fryar would pay no more than a one-fourth (¼) share of the transcript cost, prorated among the four defendants (A-24). However, once the preparation of the 39-volume transcript began in June, plaintiffs, Fryar and WLJ paid one-third (⅓) each for the costs as portions were completed. Ultimately, the entire transcript cost was paid in this manner. Neither Petitioner nor Valley Forge contributed.

On June 17, 1988, the Clerk of the court of appeals wrote to Petitioner to enforce Petitioner's participation in the transcript costs, saying that Petitioner would be barred from citing to the transcript and threatening dismissal. The Clerk asked for a response before the transcript was due to be filed, July 30, 1987 (A-25). No such letter was sent to Valley Forge. The time for filing the transcript was extended and no response was made by Petitioner to the Clerk.

On August 4, 1987, the appellees asked the Clerk to dismiss Petitioner's appeal, which the Clerk did on August 19, 1988 (A-2). The transcript was not filed until August 27, 1987.

Thereafter, Petitioner attempted to cure the assessed default by paying the claimed shares to Fryar and WLJ and by making tender to appellees, who refused to accept. Petitioner's motion to reinstate was denied on December 18, 1987, despite the fact that appellees' brief was not due until February 8, 1988. Sole opposition to the motion came from the appellees. The Fifth Circuit in panel denied the motion on February 5, 1988. At no time from the filing of the notices of appeal up to the making of this Petition has Valley Forge paid any transcript costs, yet Valley Forge remains a party to the appeal with no sanctions threatened or imposed by the Clerk or the court of appeals itself. Certiorari is now sought on the basis that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Sup. Ct. R.* 17.1(a).

ARGUMENT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE FEDERAL AND LOCAL RULES OF APPELLATE PROCEDURE, USED TO DISMISS PETI-

TIONER'S APPEAL, WAS NOT UNIFORM WITHIN THE CASE AND CONSTITUTED UNEQUAL ADMINISTRATION OF THE LAW.

Certiorari can be granted where there has been a threat to the uniform application of rules of procedure and an inequitable administration of the law. *Hanna v. Plummer,* 380 U.S. 460 (1965). The violation of procedural standards has resulted in the granting of certiorari. *Chapman v. United States,* 365 U.S. 610 (1961) (admissibility of evidence).

A. Discrimination between Petitioner and a Co-appellant.

Petitioner did not pay transcript fees; thus its appeal was dismissed by the Clerk. Valley Forge paid no fees, yet no sanctions were threatened or imposed. Petitioner made or tendered full payment of its alleged share prior to the ruling on its motion for reinstatement, which motion was nonetheless denied. Valley Forge has never tendered any payment in any sum, yet it remains a participant to the proceedings, Such a disparity in treatment of two appellants in the same action seeking review of a $10,000,000 judgment is arbitrary, capricious, and inequitable; it far departed from the usual conduct of judicial proceedings.

B. Discrimination between Petitioner and Appellees.

Equivalent disparity is evident in the treatment accorded by the Clerk to appellees on the one hand and Petitioner on the other.

The original plan was for the four defendants/appellants to bear the cost pro rata. Then the plaintiffs cross appealed, and, as cross-appellants, they bear an equal burden for the record and the transcript.

After discussing the designation provisions of *Fed. R. Civ. P.* 75, 7 J. Moore, *Moore's Federal Practice* ¶ [3.-4]

at 75-20 (2d ed. 1982) notes: "A cross-appeal places on the cross-appellant the same duty to designate portions of the transcript as is described above."

In *Schuldes v. National Security Corp.*, 27 Ariz. App. 611, 557 P.2d 543 (1976), the court dealt with an adopted identical version of *Fed. R. Civ. P.* 75. When the record proved insufficient to make a full determination, the court held that "[a] complete record is the responsibility of the appellee-cross-appellant . . . ." 557 P.2d at 550.

With equal duties imposed on appeal, logic dictates that the collective cross-appellants share the transcript costs equally with the collective appellants. Apportionment of the cost by assigning 50% to appellants and 50% to cross appellants is the only equitable division possible. For example, in a case involving 99 appellants and one cross-appellant, numerical proration would result in the cross-appellant bearing only 1% of the cost. Assuming that equal proration between the four appellants would have been proper, Petitioner would have been assessed ¼ of ½ of the total transcript cost of 12.5%. The cost of the transcript was $14,500. Petitioner's maximum share thus would have been $1,812. The Clerk's computations held the Petitioner to a payment of twice that amount or $3,625; with four appellants and two cross-appellants the Clerk sought to charge Petitioner ¼ of the whole cost.

Plaintiff/cross-appellants' share of 50% of the cost would have been $7,250, yet they only paid 33-⅓% or the sum of $4,833, leaving a balance due of $2,417, a deficiency twice as large as that owed by Petitioner. Despite this substantial deficiency owed to the transcript fund, cross-appellants were able to cause Petitioner's appeal to be dismissed.

Once again, the Fifth Circuit misapplied the rules to

the substantial detriment of one party, this time in favor of the defaulting plaintiffs possessed with a $10,000,000 judgment and suffering from no prejudice.

This question, involving the Fifth Circuit's dismissal of an appeal for appellant's failure to pay an excessive share of transcript costs at the request of a defaulting appellee while permitting a defaulting co-appellant to proceed without sanctions, is unique. The propriety of the Fifth Circuit's refusal to reinstate the appeal after payment or tender of the Petitioner's excessive share, while the defaulting co-appellant has never paid but was permitted to proceed, presents a similarly unique issue. Here the Fifth Circuit refused to reinstate despite there being no prejudice to the defaulting cross-appellants who declined the tender and opposed the motion.

These questions present a substantial issue of uniform application of the rules, an issue created by the Fifth Circuit's unprecedented departure from the accepted practice of fair and impartial appellate procedure.

II. ONCE ARRANGEMENTS HAVE BEEN MADE FOR THE PAYMENT OF TRANSCRIPT COSTS, THE CLERK CANNOT REAPPORTION CONTRIBUTION UNDER THREAT OF DISMISSAL WITHOUT MISAPPLYING AND VIOLATING THE RULES OF PROCEDURE.

Dismissal of a complaint for procedural violations can raise important questions regarding the proper application of Federal Rules of Procedure and will warrant granting of certiorari. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 250-51 (1957).

Petitioner, along with three other defendants, appealed from a judgment in excess of $10,000,000 resulting

from a verdict rendered by a tampered jury.

Petitioner's appeal was dismissed by the Clerk of the Fifth Circuit under 5th Cir. R. 42.3.2, which provides for dismissal for want of prosecution, for failure to order a transcript of the trial.

The requirements governing the ordering of a transcript are governed by *5th Cir. R.* 10.1, which provides in relevant part that the transcript order "shall be on a form prescribed by the clerk" and further provides that "*[i]f no transcript is ordered,* appellant shall file with the clerk a copy of the certificate to that effect . . ." (emphasis added). The official form for the transcript order prescribed by the Clerk of the Fifth Circuit specifically provides a place for an appellant to elect not to order a transcript.

Furthermore, the Internal Operating Procedures for the Fifth Circuit state that "[t]he plan is to provide for the relationship with litigants to [that] specified in the Court Reporter Act, including fees charged for transcripts . . . ." *5th Cir. R.* 11.1 [I.O.P.]. The relevant portion of the Court Reporter Act, 28 *U.S.C.* § 753(b), provides that the reporter is required to prepare a transcript only "[u]pon the request of any party . . . who has agreed to pay the fee therefor." 28 *U.S.C.* § 753(b).

Fed. R. App. P. 10(b) addresses the case of a single appellant; the function of the rule is to provide the courts of appeal with a record of the proceedings below. The rule does not address the question of multiple appellants, and nowwhere can there be found any support for the Clerk's position that every appellant must participate in the transcript fees or suffer the extreme sanction of dismissal. As long as a transcript is ordered and paid for, the matter of apportionment of costs is between the parties themselves. This has been recognized both in the rules and by the Clerk himself.

5th Cir. R. 10.1 and the form prescribed by the Clerk provide an appellant with the opportunity to decline to order a transcript. In the Clerk's letter to Petitioner's counsel, the Clerk acknowledged that Petitioner was not obligated to order a transcript so long as another party or parties paid. In this case, the costs in fact were paid. 28 *U.S.C.* § 753(b) directs simply that the transcript be given to whoever pays for it, and the providing of the transcript under 28 *U.S.C.* § 753(a) must meet the preparation and transmission requirements of *Fed. R. App. P.* 11 and *5th Cir. R.* 11.

The purpose of the rules and 28 *U.S.C.* § 753(a) is to ensure that transcripts are provided to the Fifth Circuit and that the reporters get paid for their work. Many cases involving multiple appellants have primary and secondary defendants. If the appeal is important enough for one appellant to bear the costs, his co-ap-ellants are entitled to take advantage of that situation, so long as one appellant is prepared to bear the costs of the transcript alone. The rules neither authorize nor direct the Clerk to act as a collection agent for the parties bearing a larger share of the costs. The payment of the cost had been arranged; the requirements of *Fed. R. App. P.* 10 were therefore met. Dismissal of Petitioner's appeal violated the rules of court.

The important question presented herein in the administration of lower courts and the uniform application of the rules is whether the Clerk can force reapportionment of costs between co-appellants to require pro rata contribution, even though arrangements for the costs have been made by the parties themselves; furthemore, whether the Clerk is then empowered to dismiss the appeal of petitioner with prejudice in the absence of obedience to the Clerk's proration.

III. DISMISSAL OF AN APPEAL FOR A PROCEDURAL RULE VIOLATION NOT RESULTING IN ANY PREJUDICE TO ANY PARTY IS IN DIRECT CONFLICT WITH THE RULE OF THE FIFTH CIRCUIT THAT SUCH DISMISSALS SHALL NOT OCCUR UNLESS PREJUDICE RESULTED FROM THE ERROR.

The order at issue conflicts with another decision in the Fifth Circuit.

Conflicts between decisions of a court of appeals create a basis for the granting of certiorari. *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, *rehearing denied*, 377 U.S. 974 (1964).

In *Marcaida v. Industrial Indemnity Insurance Co.*, 569 F. 2d 829 (5th Cir. 1978), the late filing of a brief, rather than the failure timely to make arrangements for the payment of a share of the transcript, raised the possibility of dismissal as a sanction. However, the principles involving the application of the rules and the powers of default are the same.

In *Marcaida*, in violation of *Fed. R. App. P.* 27(a), appellants' counsel consistently failed to serve opposing counsel with motions for extentions of time to file appellant's brief. Appellee moved to dismiss, but the Fifth Circuit denied the motion, stating: "Despite this performance by counsel for plaintiffs-appellants, appellee can point to no prejudice flowing to him." *Id.* at 830.

In this case as well, there has been no showing of prejudice by any party. Arrangements had been made for payment of the transcript, and the transcript was being prepared, delivered, and paid for throughout the summer of 1987. At the time of dismissal of Petitioner's appeal, the

entire 39-volume transcript was only five working days away from being filed with the court. As of August 19, 1987--the date of dismissal--the schedule for filing of briefs had not yet been fixed. Furthemore, Petitioner sought to cure the claimed deficiency by paying or tendering the sums claimed due by the Clerk to the various counsel involved. Nonetheless, reinstatement was denied on December 18, 1987, despite the fact that the appellees' brief was not even due until February 8, 1988.

Petitioner's lack of participation in transcript preparations created neither procedural nor substantive prejudice to any of the other parties. Whatever financial inconvenience Petitioner may have occasioned regarding the transcript cost was cured by its tender of its full pro rata share prior to the reinstatement request.

No prejudice having been occasioned, the legal cost to Petitioner is vastly disproportionate to the negligible inconvenience caused. Petitioner has now suffered a final judgment totaling more than $10,000,000 as a result of a verdict rendered by a tampered jury. The decision to dismiss and the refusal to reinstate despite the complete absence of prejudice is in direct conflict with the Fifth Circuit's decision in *Marcaida*.

CONCLUSION

For the foregoing reasons, the Petitioner, All American Services Company, Ltd., respectfully requests this Court to issue a writ of mandamus to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHRIS J. ROY (A LAW CORPORATION)
711 Washington Street
P. O. Box 1911
Alexandria, Louisiana 71301
Telephone: (318) 487-9537

BY: _____
CHRISTOPHER J. ROY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing application for writ of mandamus has been served upon the Honorable, Court of Appeal, Fifth Circuit, New Orleans, Louisiana, the Honorable Sam D. Johnson, United States Circuit Judge, United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana and upon counsel of record on this 25 day of July, 1988.

CHRISTOPHER J. ROY
ATTORNEY FOR PETITIONER,
ALL AMERICAN SERVICES, LTD.

COUNSEL OF RECORD TO BE SERVED

Stone, Pigman, Walther, Wittmann & Hutchinson
546 Carondelet Street
New Orleans, Louisiana 70130-3588

Voorhies & Labbe
Post Office Box 3527
Lafayette, Louisiana 70502

Liskow & Lewis
50th Floor
One Shell Square
New Orleans, Louisiana 70139

J. Minos Simon, Ltd.
1408 West Pinhook Road
Lafayette, Louisiana 70505

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Filed
Feb 19 1987

EDWARD C. ABELL, JR., *ET AL.*	*	CIVIL ACTION
	*	
VERSUS	*	NO. 84-1786
	*	
POTOMAC INSURANCE COMPANY OF ILLINOIS, *ET AL.*	*	SECTION "O"
	*	
	*	MAGISTRATE
* * * * * * * * * * * * * *	*	DIVISION

JUDGMENT

This action came on for jury trial before the Court on December 8, 1986, with the Honorable John M. Shaw, District Judge presiding, and the issues having been duly tried and a verdict having been duly rendered in favor of plaintiffs on February 4, 1987;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Edward C. Abell, Jr. and Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds, and against defendants Joe E. Fryer, All American Services Company, Ltd., Wright, Lindsey and Jennings and Valley Forge Insurance Company jointly and severally in the full and true sum of $6,715,800, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment, together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings and Valley Forge Insurance Company *in solido* in the

full and true sum of $1,540,000, with interest thereon at the rate of 12% per annum from date of judicial demand until date of payment, together with taxable court costs and attorneys' fees as set forth below. This portion of the judgment is a part of and encompassed within the award made in the above paragraph. Hence, if recovery is had under the award made in the above paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants, Joe E. Fryar and All American Services Company, Ltd., jointly and severally in the full and true sum of $2,550,000, together with interest thereon from date of this judgment until date of payment, together with all costs of the suit and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against All American Services Company, Ltd. in the full and true sum of $2,950,000, together with interest thereon from date of this judgment until date of payment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Wright, Lindsey and Jennings and Valley Forge Insurance Company *in solido* in the full and true sum of $300,000, together with interest thereon at the rate of 12% from date of judicial demand until date of payment, together with all costs of these proceedings. This portion of the judgment is also encompassed within and a part of the award made in the first paragraph. Hence, if recovery is had under the award made in the first paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and aginst Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings, and Valley Forge Insurance, *in solido,* in the full and true sum of $2,567,323.80, representing reasonable attorneys' fees, together with taxable costs of this proceeding to be determined upon the plaintiffs' submission of their bill of costs. Of this amount, only $2,117,323.00 shall be payable to counsel for plaintiffs and the balance shall be paid to the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs and against Joe E. Fryar and All American Services Company, Ltd. *in solido* for the full and true sum of $263,743.00, representing costs and expenses of this litigation compensable under the RICO statute but not taxable under 28 U.S.C. 1920. Of this amount, $64,071.29 shall be payable to counsel for plaintiffs and the balance shall be paid to plaintiffs.

OPELOUSAS, LOUISIANA, this 19 day of February, 1987.

ROBERT H. SHEMWELL,
Clerk of Court, United States
District Court for the Western
District of Louisiana

BY: Mildred Baker
Mildred Baker, Deputy Clerk

Approved as to form:

/s/ John M. Shaw

John M. Shaw, United
State District Judge

Date Feb 20 1987

Judgment entered 2-19-87
By Rita V. Watkins

Notice to:

Wittman	Goudelocke
Ousis	Weems, III
Hamilton III	Staffard, Jr.
Provosty, Jr.	Frankhauser
Odom	Nunnally, III
Smith	Downing
Humphries, Jr	Welch
Breaux	Davidson
Sommer	Munsterman
Stahl	Mayer
Bienvenu	Schomp
Melichar	Simon
Alltmont	

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

August 19, 1987

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Robert H. Shemwell, Clerk
U.S. District Court
500 Fannin St., Rm. 106
Shreveport, LA 71101

No. 87-4260-ABELL -vs- POTOMAS.
(CA 84 1786 "O")

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate as to All American Services Co., Ltd. ONLY.*

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☐ Copy of the Court's opinion.
☐ Original record on appeal or review. ____Volumes.

☐ Other original papers forwarded with record ____Envelope ____Box.

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

cc:and copy of order to:
Mr. J. Minos Simon
Mr. D. Mark Bienvenu
Mr. Leslie R. Leavoy, Jr.
Mr. Phillip A. Wittman

Sincerely,

GILBERT F.
GANUCHEAU, CLERK

By:/s/Andrew Rondeno
Deputy Clerk

*Appeal remains open as to other appellants & cross-appellants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

EDWARD C. ABELL, JR., ET AL.,
Plainntiffs-Appellees
Cross-Appellants,

versus

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, ET AL.,
Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.

versus

Defendant-Third Party
Plaintiff,

ALL AMERICAN SERVICES CO., LTD.,
Third Party Defendant-
Appellant-Cross-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed as to All American Services ONLY for want of prosecution for failure of *appellant to order transcript and make financial arrangements with Court Reporter* within the time fixed by the rules, this 19th day of August 1987.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /s/ Andrew Rondeno
DEPUTY CLERK
FOR THE COURT - BY DIRECTION

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

Filed Dec 18 1987

EDWARD C. ABELL, JR., and CAREY WALTON
Plainntiffs-Appellees
Cross-Appellants,

versus

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, and WRIGHT, LINDSEY & JENNINGS and VALLEY FORGE INSURANCE COMPANY,
Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.
Defendant-Third Party
Plaintiff,

versus

ALL AMERICAN SERVICES CO., LTD.,
Third Party
DefendantCross-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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O R D E R:

IT IS ORDERED that the motion of All American Services Company, Ltd., to reinstate it's appeal is DENIED.

/s/ Sam D. Johnson
SAM D. JOHNSON
U. S. CIRCUIT JUDGE
12-16-87

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

Filed Feb 5 1988

EDWARD C. ABELL, JR., and CAREY WALTON
Plainntiffs-Appellees
Cross-Appellants,

versus

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, and WRIGHT, LINDSEY & JENNINGS and VALLEY FORGE INSURANCE COMPANY,
Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.
Defendant-Third Party
Plaintiff,

versus

ALL AMERICAN SERVICES CO., LTD.,
Third Party
DefendantCross-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A member of this panel has heretofore denied appellant's motion for reinstatement of this appeal. Upon consideration by this panel upon request of appellant. All American Services, IT IS ORDERED that appellant's motion to reinstate is DENIED.

FRAP 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in b(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the

appellant, file within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

LOCAL RULE

10.1. Ordering The Transcript—Duty of Appellant. Appellant's order for the transcript of proceedings, or parts thereof, contemplated by FRAP 10(b) shall be on a form prescribed by the Clerk, and a copy of such order form shall be furnished by counsel to the Clerk in addition to the other parties set out in FRAP 10(b). If no transcript is to be ordered, appellant shall file with the Clerk a copy of the certificate to that effect which counsel served on the parties under FRAP 10(b).

10.2. Form of Record. The record on appeal shall be bound in a manner which will facilitate reading with pages numbered consecutively by the Clerk of the District Court.

[I.O.P.— The district court will furnish a purchase order form as required by this Court when the notice of appeal is filed. In criminal appeals the district court will furnish a special form at the time of sentencing. Once purchase order has been completed and forwarded to the reporter, with adequate financial arrangements made, counsel's responsibility under the 1979 amendments to FRAP 10 and 11 will have been fulfilled.]

FRAP 11 Transmission of the Record

(a) Duty of Appellant. After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exibits other than documents, and such

other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Rule 11. Transmission of the Record

11.1 Duties of Court Reporters—Extensions of Time. The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

11.2. Duty of the Clerk. It is the responsibility of the

Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

11.1. Duties of Court Reporters—Extensions of Time

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

28 U.S.C. § 753. Reporters

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechinical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of

the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arrangements, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of the transcript so made.

The transcript in any case certified by the repporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the prodeedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

APPENDIX E

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. **CV84-1786-L-0/0** District of **WESTERN DISTRICT OF LOUISIANA** Notice of Appeal Fld. **Yes,** Short Case Title **ABELL VS. POTOMAC, ET AL** Court Reporter **CONNIE EZELL**

PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:

☐ Transcript is unnecessary for appeal purposes

☐ Transcript is already on file in Clerk's office

☐ This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

December 8, 1986 - February 4, 1987

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.

Voir dire☐;Opening statement of plaintiff☐ defendant☐
Closing argument of plaintiff ☐ defendant ☐
Jury instructions ☐

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

☐ Private funds; ☐ Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); ☐ Other IFP Funds;

☐ Advance Payment waived by reporter; ☐ U.S. Government Funds;

☐ Other_____

Signature _____ Counsel for **JOE E. FRYAR**

(print Name)**J. MINOS SIMON** Telephone (318)233-4625

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

PART II COURT REPORTER ACKNOWLEDGMENT (Read instructions on reverse side of copy 4 before completing).

Date transcript order received	If arrangements are not yet made, date contact made with ordering party re: financial arrangements	Estimated completion date	Estimated number of pages
4/16/87		6/30/87	4,000

☑ Satisfactory Arrangements for payment were made on 4/16/87

☐ Arrangements for payment have not been made. Reason: ☐ Deposit not received ☐ Unable to contact ordering party ☐ Other (Specify)____

4/30/87	Connie S. Ezell	(318) 261-1374
Date	Signature of Court Reporter	Telephone

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 4-To be sent to Court Reporter of Part II and Transmittal to U.S. Court of Appeals (5th Circuit), 600 Camp Street, New Orleans, LA 70130

APPENDIX F

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. **CV84-1786-L-0/o** District of **WESTERN DISTRICT OF LOUISIANA** Notice of Appeal Fld. **Yes, April 20, 1987**

Short Case Title **ABELL VS. POTOMAC, ET AL** Court Reporter **CONNIE EZELL**

PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:

- ☐ Transcript is unnecessary for appeal purposes
- ☐ Transcript is already on file in Clerk's office
- ☐ This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

December 8, 1986 - February 4, 1987

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.

Voir dire☒;Opening statement of plaintiff☐X;defendant☒

Closing argument of plaintiff ☒ defendant ☒

Jury instructions ☒

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

☒ Private funds; ☐ Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); ☐ Other IFP Funds;

☒ Advance Payment waived by reporter; ☐ U.S. Government Funds;

☐ Other_____

Signature **D. Mark Bienvenu** Counsel for **Wright, Lindsey & Jennings and Valley Forge Insurance Company**

D. Mark Bienvenu

Date April 22, 1987 **Telephone (318) 232-9700**

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

PART II COURT REPORTER ACKNOWLEDGMENT (Read instructions on reverse side of copy 4 before completing).

Date transcript order received	If arrangements are not yet made, date contact made with ordering party re: financial arrangements	Estimated completion date	Estimated number of pages
April 22		6/30/87	4,000

☑ Satisfactory Arrangements for payment were made on 4/22/87

☐ Arrangements for payment have not been made. Reason: ☐ Deposit not received ☐ Unable to contact ordering party ☐ Other (Specify)____

4/30/87	Connie S. Ezell	(318) 261-1374
Date	Signature of Court Reporter	Telephone

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 1-To be transmitted to U.S. Court of Appeals (5th Circuit), 600 Camp Street, New Orleans, LA 70130, upon completion of Part I

APPENDIX G

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. 84-1786 "0" District of WESTERN (LOUISIANA) Notice of Appeal Fld. April 20, 1987
Short Case Title EDWARD ABELL, JR. V POTOMAC
Court Reporter CONNIE EZELL
PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:
- ☒ Transcript is unnecessary for appeal purposes
- ☒ Transcript is already on file in Clerk's office
- ☐ This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

_____
_____
_____

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.
Voir dire☐; Opening statement of plaintiff☐ defendant☐
Closing argument of plaintiff ☐ defendant ☐
Jury instructions ☐

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

☐ Private funds; ☐ Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); ☐ Other IFP Funds;

☐ Advance Payment waived by reporter; ☐ U.S. Government Funds;

☒ Other N/A (costs to be divided between four defendants)

Signature Leslie R. Leavoy, Jr. Counsel for ALL AMERICAN SERVICES CO., LTD

(Print Name) LESLIE R. LEAVOY, JR. Telephone (318) 487-9537

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

Date MAY 6, 1987

PART II COURT REPORTER ACKNOWLEDGMENT (Read instructions on reverse side of copy 4 before completing).

Date transcript order received	If arrangements are not yet made, date contact made with ordering party re: financial arrangements	Estimated completion date	Estimated number of pages

☐ Satisfactory Arrangements for payment were made on

☐ Arrangements for payment have not been made. Reason: ☐ Deposit not received ☐ Unable to contact ordering party ☐ Other (Specify)_____

_____

_____ _____ _____

Date Signature of Court Reporter Telephone

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 1-To be transmitted to U.S. Court of Appeals (5th Circuit), 600 Camp Street, New Orleans, LA 70130, upon completion of Part I

APPENDIX H

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 18, 1987

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Leslie R. Leavoy, Jr.
Attorney at Law
711 Washington Street
Alexandria, LA 71301

No. 87-4260-ABELL -vs- Potomas Insurance Co.

Dear Mr. Leavoy:

The information contained in a letter from Connie Ezell to George Bauer of this office of May 8, 1987 conflicts with the information that you set out in your letter to me of May 6, 1987 that each of the four appellants would have a pro rata share of the cost of the preparation of the transcript in this cause. She now tells us that you are not ordering a copy of the transcript, but will borrow one of the other defendants' copies if necessary. We have no problem with that, so long as the other defendants know that they will then bear the cost of the transcript.

Very truly yours,

/s/ Gilbert F. Ganucheau
GILBERT F. GANACHEAU
CLERK

GFG/jmg
cc: Mr. J. Minos Simon
Mr. D. Mark Bienvenu
Mr. Phillip A. Wittman
Ms. Connie Ezell

LAW OFFICE OF
J. MINOS SIMON,

1408 West Pinhock Rd.
Post Office Box 52116
Lafayette, Louisiana 70505
318-233-4625

May 21, 1987

Mr. Gilbert F. Ganaucheau
Clerk, United States Court of Appeals,
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

RE: Edward C. Abell, Jr., et al vs Potomac Insurance Company, et al Appeal Number: 87-4260

Dear Mr. Ganaucheau:

This will acknowledge receipt of your letter of May 18, 1987 addressed to Mr. Leslie R. Leavoy, Jr., Attorney at Law, Alexandria, Louisiana. This letter speaks to Mr. Leavoy's statement that, in lieu of a pro rata sharing of the costs of the preparation of the transcript in this cause, he, on behalf of his client, intends to borrow a copy of the transcript from one of the defendants.

My client has reached no such agreement with Mr. Leavoy or his client, All American Services. Nor does my client agree to a pro rata sharing of the costs in excess of one—fourth (¼th) of that cost.

This letter is written in response to your communication just mentioned and for the record.

JMS:jhr

Very truly yours,
J. MINOS SIMON

By: /s/ J. Minos Simon
J. MINOS SIMON

cc: D. Mark Bienvenu
Philip A. Witmann
Leslie R. Leavoy, Jr.
Connie Ezell

APPENDIX J

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

June 17, 1987

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Leslie R. Leavoy, Jr.
Attorney at Law
711 Washington Street
Alexandria, LA 71301

No. 87-4260-ABELL -vs- Potomas Insurance Co.

(USDC No. CA 84 1786 "O")

Dear Mr. Leavoy:

Reference Mr. J. Minos Simon's letter to me of May 21, 1987 in response to my letter to you of May 18, 1987. We need to know what your client's intentions are in connection with the pro rata sharing of the cost of the preparation of the transcript in this cause. If the appellant intends to refer to the evidence, it is the appellant's responsibility to include a transcript and make satisfactory financial arrangements with the reporter for the payment thereof. Therefore, it would seem that your client is in default of the rule with the appeal subject to dismisssal under our Local Rule 42.3.

We are approving a 30 day extension to July 30, 1987 for the court reporter to complete the transcript. We need to know what your intentions are prior to that date.

Very truly yours,

/s/ Gilbert F. Ganucheau
GILBERT F. GANACHEAU
CLERK

GFG/jmg
cc: Mr. J. Minos Simon
Mr. D. Mark Bienvenu
Mr. Phillip A. Wittman
Ms. Connie Ezell

No. 88-152

In The
Supreme Court of the United States
October Term, 1988

—o—

IN RE: All American Services, Ltd.,
Petitioner

—o—

ON WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

BRIEF OF RESPONDENTS EDWARD C. ABELL, JR. AND CAREY WALTON IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

—o—

PHILLIP A. WITTMANN
KYLE SCHONEKAS
JUDY Y. BARRASSO
C. LAWRENCE ORLANSKY
OF
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, LA 70130
Telephone: (504) 581-3200
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

I.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a petition for "certiorari" filed eleven months after entry of the mandate of dismissal.

2. Whether the Court should grant a mandamus based upon a petition styled as a petition for writ of mandamus which fails to establish the presence of exceptional circumstances and the unavailability of ordinary relief.

3. Whether an appellate court may dismiss and deny reinstatement of an appellant's appeal where the appellant failed to timely take steps required to prosecute its appeal and to seek reinstatement after dismissal.

II.

PARTIES TO PROCEEDING

Plaintiffs-Appellees-Cross Appellants (Respondents)

Edward C. Abell, Jr., Carey Walton, individually and as representatives of the class of purchasers of Westside Habilitation Center Revenue Bonds

Defendants-Appellants

Joe E. Fryar

Law Firm of Wright, Lindsey & Jennings
of Little Rock, Arkansas

Valley Forge Insurance Company

All American Service Company, Ltd.
of Hamilton, Bermuda (Petitioner)

III.

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IV.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Statutes

Other

V.

OBJECTIONS TO JURISDICTION

This Court Lacks Jurisdiction To Consider The Petition Which is Untimely.

Petitioner, All American Services Co., Ltd., ("All American"), a Bermuda corporation, seeks review of an order and mandate entered by the United States Court of Appeals for the Fifth Circuit on August 19, 1987, dismissing its appeal from the judgment in favor of the plaintiff class of purchasers of Westside Habilitation Center Revenue Bonds. Four months after the issuance of the mandate of dismissal by the Fifth Circuit, petitioner belatedly filed a motion seeking reinstatement of its appeal. Petitioner's motion was denied by an order dated December 16, 1987. Twenty-five days after entry of the order denying its motion for reinstatement, petitioner filed another belated motion requesting reconsideration of the Fifth Circuit's order denying reinstatement and/or the extraordinary remedy of suspension of the court's rules. The Fifth Circuit denied petitioner's motion for reconsideration and/or suspension of the rules by order dated February 5, 1988.

Subsequent to the rendering of the third order maintaining dismissal of petitioner's appeal, respondents proceeded to execute on the judgment against petitioner in favor of the plaintiff class. Pursuant to an order issued by the district judge on March 14, 1988, in excess of $3 million recovered from petitioner was distributed to members of the class located in 30 states, the District of Columbia and London, England and its counsel on approximately June 30, 1988.

Eleven months after issuance of the mandate of dismissal, nearly six months after rendering of the *second* order denying reinstatement, and one month after distribution of the funds to the plaintiff class, petitioner filed on July 26, 1988, a petition styled as a "Petition For Writ Of Mandamus" seeking for the first time review by this Court of the Fifth Circuit's order of August 19, 1987 dismissing its appeal. The petition is untimely; therefore, the Court lacks jurisdiction.

It is well established that an appeal from a civil decision or a petition for writ of certiorari must be filed with this Court within ninety days of the entering of the decree. 28 U.S.C. § 2101; Sup. Ct. R. 20. Although an extension of this time period may be granted, such extensions, which are not favored, are limited to an additional sixty days and must be justified by proof of good cause. 28 U.S.C. § 2101(c); *Kleem v. Immigration & Naturalization Service*, — U.S. —, 107 S. Ct. 484 (1986) (extensions are disfavored). Otherwise, this Court lacks jurisdiction to consider the petition. *Dept. of Banking v. Pink*, 317 U.S. 264, 63 S. Ct. 233 (1942) (where three month filing requirement was not complied with, petition for certiorari must be denied for want of jurisdiction); *Rust Land & Lumber Co. v. Jackson*, 250 U.S. 71, 39 S. Ct. 424, 63 L.Ed. 850 (1919) (Court could not entertain writ of certiorari filed after expiration of time period within which to file petition).

The petition here is untimely. The mandate dismissing the appeal was entered eleven months ago. No extensions of the time period with which to file have been sought or obtained. Accordingly, the deadline to file an appeal

or a petition for writ of certiorari lapsed in November, 1987, some eight months prior to the filing of the petition.

Indeed, even giving petitioner the benefit of the two subsequent orders denying reinstatement which were entered in response to petitioner's untimely motions for reinstatement does not save this petition.[1] The latest order of the Fifth Circuit denying reinstatement was entered on February 5, 1988. Again, no extension of time within which to file was sought or obtained. Accordingly, the time period within which an appeal or petition for certiorari should have been filed expired on May 6, 1988. This petition filed over sixty days after expiration of the deadline is untimely.[2]

Petitioner obviously attempts to avoid the time limitations imposed by Congress and the rules of this Court by disguising its untimely petition as a "Petition for Writ of Mandamus". Petitioner's attempts to hide a wolf in sheep's clothing are unavailing because even a cursory review of the petition reveals that it is nothing more than an untimely petition for writ of certiorari. Conspicuously absent from the text of the petition is any mention of the standard for granting the extraordinary

---

1 The orders entered on December 18, 1987, and February 5, 1988 were in response respectively to petitioner's Motion To Reinstate filed on December 2, 1987, and its Motion For Reconsideration filed on January 11, 1988. These notices which were filed four and five months respectively after the mandate of the Fifth Circuit Court of Appeal was entered on August 19, 1987, themselves were untimely and should not be construed to somehow give petitioner additional time within which to file. (App. A at A-14; App. B at A-17)

2 The petition would be untimely even if the permitted sixty day extension of time had been granted.

writ of mandamus or the specifications required by Rules 26 and 27 of this Court's Rules regarding the presence of exceptional circumstances warranting the exercise of the Court's discretionary powers and the unavailability of ordinary relief. Instead, petitioner consistently refers to rules and jurisprudence applicable to petitions for the writ of certiorari. For example, on page three of the petition, petitioner admits that certiorari is sought, referring to Rule 17.1(a) pertaining to petitions of certiorari. Similarly, on pages 4 and 6, reference is made to jurisprudence supporting the grant of certiorari, not the writ of mandamus. Other than in the title of the petition and implicitly by reference to 28 U.S.C. § 1651, mention of the writ of mandamus is absent from the petition.

Discarding petitioner's veiled attempt to disguise its untimely petition, it is patently obvious that the petition is a petition for writ of certiorari. Accordingly, the petition is untimely, and the Court lacks jurisdiction to consider it.

———o———

VI.

STATUTES AND RULES

VII.

STATEMENT OF THE CASE

1. Background.

This action was instituted on July 5, 1984, by respondents, Edward C. Abell, Jr. and Carey Walton, individually and as representatives of the class of purchasers of Westside Habilitation Center Revenue Bonds, for violations of federal and state securities laws, state law fraud, and the Racketeer Influenced Corrupt Organizations Act. Respondents' claims arise out of a scheme to defraud bondholders embarked upon by, among others, defendant Joe E. Fryar ("Fryar") and the petitioner, All American, a Bermuda corporation organized and controlled by Fryar.

An integral part of the scheme to defraud involved inflation of the price of the bonds by over $2.3 million through a fraudulent real estate transaction. Particularly, Fryar acquired a vacant school building in Cheneyville,

Louisiana for $100,000.00, upon which Westside Habilitation Center, an intermediate care facility for the mentally retarded, was to be constructed. In an attempt to divert a significant portion of the bond proceeds for his own use, Fryar caused the property to be sold for $150,000 to All American, a Bermuda corporation formed at Fryar's behest as a vehicle to accomplish the fraud.

Immediately prior to the issuance of the bonds, Fryar caused All American to sell the Cheneyville property to the not-for-profit entity organized for purposes of issuing the bonds, Westside Habilitation Center, Inc. ("Westside"). The price paid by Westside for the very same property, which had not been improved since it was sold for $150,000, was $2,459,700.

Pursuant to a certain Development Agreement between Fryar and Westside, Fryar himself was to purchase and deliver bonds in an aggregate principal amount of $2 million to a trustee. Thus, Fryar was to have $2 million of his own funds at risk as security for the performance of his obligations, a fact expressly used to induce investors to purchase bonds. In furtherance of the scheme, however, $2 million of the grossly inflated purchase price was used to purchase $2 million of Westside bonds which were then pledged to secure performance of Fryar's obligations under the Development Agreement. Hence, by interposing All American in the transaction, Fryar was able to hide the fact that the price of the real estate had been grossly inflated and that he was not using his own monies to purchase the Westside bonds that ultimately were pledged to secure his performance. All American was paid interest at the rate of 16½% on the $2 million of

Bonds obtained through the fraudulent scheme. As of the date of trial, December 8, 1986, All American had received $2.8 million of Bonds and in excess of $800,000 in interest as a result of the fraudulent scheme. (App. C at A-18).

The trial court found that All American was "organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property". (App. D at A-19 [p.16]). The evidence established that All American had engaged in no business other than the transaction at issue (App. E at A-22) and had no paid employees other than the president, who formerly did secretarial work for the alleged original owner and who admitted to having no knowledge about the transactions at issue or the litigation itself. (App. F at A-23). All American's alleged present owner is a Cayman Island corporation which refused to produce a representative to appear at trial. (App. G at A-24). Its only assets are Westside Bonds received through the fraudulent scheme, and interest paid on the Bonds. At the time of trial, in excess of $700,000 of the interest paid on the Westside Bonds was on deposit in Bermuda banks beyond the jurisdiction of the Court. (App. C at A-18).

2. All American's Actions In The Trial Court.

Throughout this litigation, All American exhibited a cavalier attitude toward this country's rules of procedure. Particularly, because the relationship between Fryar and All American was a central issue in the litigation, respondents vigorously sought to discover information regarding this relationship and the nature of All American's participation in the Westside project. Disregarding the discovery rules, All American concealed documents, fabricated

documents, threatened a witness to prevent his appearing to testify, and refused to comply with the trial court's order to produce at trial representatives and parties within its control. For example, although for two years plaintiffs sought by subpoenas and requests for production to obtain all documents from All American pertaining to the transaction at issue, on the eve of trial All American produced previously undisclosed *copies* of documents purporting to be corporate records of All American, correspondence between All American and Fryar, and correspondence between All American and its counsel.

The originals of the "new documents" were not produced, notwithstanding the questionable authenticity of the copies. The trial court noted the suspicious nature of these "new documents" in its reasons for denying motions for Judgment Notwithstanding The Verdict.[3] (App. D at A-19 [pp. 19-20, 27]).

All American's attempt to circumvent the rules goes far beyond its concealment and fabrication of documents. It also interfered with discovery by threatening a witness to dissuade him from testifying. Prior to trial, respondents sought to take the deposition testimony in Bermuda of All American's officer and auditor, Ian Fleming. Mr. Fleming's testimony was critical because All American had consistently produced as representatives persons with no personal knowledge of the transactions. These persons,

---

[3] For example, the trial court described one of the "new documents" as "a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial". (App. D at A-19 [pp. 19-20]).

in fact, testified that Mr. Fleming was more competent to testify on the matters at issue. Although Mr. Fleming originally agreed to appear for his deposition, he failed to appear and moved through an attorney who had represented All American to quash the order directing his appearance. Mr. Fleming's change of heart resulted from threats by All American to dissuade him from testifying, as established by a telex discovered during trial. (App. H at A-25).[4]

All American's disregard for our legal system extended to its own counsel, whom All American refused to pay for representing it during the nine week trial, although it had on deposit in excess of $700,000 with which to do so. (App. C at A-18).

3. All American's Actions On Appeal.

All American's callous disregard for rules and obligations continued on appeal. Other than filing a notice of appeal on April 22, 1987, All American took no action to prosecute its appeal for eight months. Contrary to the Federal Rules of Appellate Procedure and the Fifth Circuit's Local Rules, All American failed to order and arrange to pay for the transcript within the fifteen day time period. More importantly, All American consistently ignored the Court's warnings regarding its inaction.

---

[4] After a two day evidentiary hearing during trial, the trial court held that although the telex came from Bermuda (App. I at A-27), its probative value was outweighed by the prejudicial effect. The trial court further held that because All American had refused to produce Mr. Fleming and Mr. Quin, its Bermuda attorney and the addressee of the telex, pursuant to its earlier order, it would submit a jury instruction regarding the adverse inference of their failure to testify.

Approximately one month after the period had expired, the Fifth Circuit admonished All American regarding the consequences of its failure to comply with its obligation to pay for its share of the transcript. (Petitioner's App. J at A-25). All American ignored the Court's warning, failing to take any action or to respond to the Fifth Circuit.

Two months after issuing its warning and three months after the date by which All American was to order and arrange to pay its share of the transcript, All American's appeal was dismissed pursuant to an order and mandate rendered by the Fifth Circuit on August 19, 1987. (Petitioner's App. B at A-7). All American neither moved to reinstate its appeal nor contacted the Court to attempt to explain its inaction. Rather, All American simply abandoned its appeal, totally ignoring the dismissal.

Consistent with the Fifth Circuit's dismissal of its appeal, All American thereafter neither sought nor obtained an extension of the October 6, 1987 due date for its appellate brief. (App. J at A-28).[5] Rather, All American again elected to simply do nothing, ignoring its appeal and the appellate rules.

Four months after dismissal of its appeal and two months after its brief was due, All American sought to reinstate its appeal, suggesting to the Fifth Circuit that

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5 Because the Fifth Circuit had already dismissed All American's appeal without objection for failure to pay its proportionate share of transcription costs, respondents did not seek to "redismiss" the appeal for All American's failure to timely file a brief.

the intervening eight months were required to solidify fee arrangements with counsel. (App. A at A-14). The Fifth Circuit denied the motion by order dated December 18, 1987.

Twenty-five days after entry of the order denying its Motion For Reinstatement, All American requested reconsideration of the ruling and/or the extraordinary remedy of suspension of the Court's rules. (App. B at A-17). Although it initially argued as grounds for reinstatement that eight months were required to solidify fee arrangements with counsel, All American abandoned that argument in its Motion For Reinstatement. Instead, All American suggested for the first time that confusion resulting from the filing of motions and the delay in filing of the transcript somehow justified its total disregard for the Fifth Circuit's rules, notwithstanding its receipt of explicit notices regarding its obligations from the Clerk of Court. The Fifth Circuit denied All American's Motion by order dated February 5, 1988.

Thereafter, All American did nothing. It did not seek reconsideration of the order by the *en banc* court. It neither filed a petition for a writ of certiorari nor sought an extension of the time within which to do so. Rather, again ignoring laws and rules governing our courts, All American simply did nothing for over five months until it filed its Petition For Writ Of Mandamus on July 26, 1988.

In the meantime, in reliance upon well-established principles regarding finality of litigation, respondents proceeded to execute on their judgment against All American. Specifically, they caused the seizure and sale of the only assets of All American in this country. Thereafter, pursu-

ant to an order of the district court entered on March 14, 1988, the proceeds from the sale of All American's assets were distributed to 464 class members nationwide and plaintiffs' counsel.[6]

Now, eleven months after the entry of the mandate of dismissal, five months after the entry of the third order maintaining the dismissal and one month after distribution of the proceeds of the sale of All American's assets to in excess of 450 persons and the holding of oral argument on the appeals of the remaining defendants, All American seeks to resurrect the litigation by filing an untimely petition for writ of mandamus.

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VIII.

SUMMARY OF THE ARGUMENT

1. The Court lacks jurisdiction to consider the untimely petition. The petition, in effect, is a petition for writ of certiorari seeking review pursuant to Supreme Court Rule 17 of the Fifth Circuit's order dismissing its appeal. Pursuant to 28 U.S.C. § 2101 and Supreme Court Rule 20, a petition for writ of certiorari must be filed within ninety days of the rendering of the decree, absent an extension for good cause shown. Here the decree to be reviewed was rendered on August 19, 1987 or at the latest on February 5, 1988. No extension of time was obtained. The petition was filed more than ninety days after either

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[6] Also occurring since the final order denying reinstatement were the filing of briefs by the remaining parties and the holding of oral argument on June 6, 1988.

date. Accordingly, the petition is untimely and cannot be considered.

2. Petitioner has failed to satisfy its burden of proving that its right to issuance of the extraordinary writ of mandamus is clear and indisputable. Petitioner has failed to establish, as required by Supreme Court Rule 26, the presence of exceptional circumstances warranting the exercise of the Court's discretionary powers or that adequate relief could not have been had in any other form or from any other court.

3. The Fifth Circuit Court of Appeals properly dismissed petitioner's appeal pursuant to Rules 3(a) and 10(b) of the Federal Rules of Appellate Procedure and Rule 42 of the Fifth Circuit's Rules. Petitioner, which did absolutely nothing for eight months after filing a notice of appeal and ignored the Fifth Circuit's admonition regarding the possible consequences, failed to fulfill the responsibility of appellant, rendering its appeal subject to dismissal. Petitioner's total inaction thereafter justified denial of petitioner's motion for reinstatement.

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IX.

ARGUMENT

1. The Court Lacks Jurisdiction To Consider The Untimely Petition.

For the reasons discussed above, the petition is untimely. The Court, therefore, lacks jurisdiction to consider it.

2. Petitioner Has Failed To Establish Entitlement To The Extraordinary Remedy Of Mandamus.

Assuming arguendo that the petition should be considered as seeking a writ of mandamus, the petition should be dismissed because petitioner has failed to establish entitlement to the extraordinary remedy. This Court long ago declared that the writ of mandamus is an extraordinary remedy, issuable only when no other remedy is available to redress an usurpation of power. *See e.g. Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273 (1967) ("it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy"). The writ is not a substitute for an appeal and is not available if an appeal could have been invoked. *Kerr v. U.S. District Ct.*, 426 U.S. 394, 402-403, 96 S. Ct. 2119, 2124 (1976); *International Business Machines Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28, 63 S. Ct. 938, 942-943 (1943).

Because of the extraordinary nature of the writ of mandamus, the party seeking the writ has the burden of showing that its right to issuance of the writ is clear and indisputable. *Will v. U.S.*, 389 U.S. 90, 95-86, 88 S. Ct. 269, 273-274 (1967). To establish entitlement to the writ, the moving party must establish specific elements enumerated by this Court's rules. Specifically, Rule 26 provides in pertinent part:

> To justify the granting of any writ under [28 U.S.C. § 1651], it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that

adequate relief cannot be had in any other form or from any other court.

All American's petition falls woefully short of satisfying the criteria required by Rules 26 and 27. All American has offered no explanation regarding why other relief was not available. All American could have appealed or timely sought a writ of certiorari for review of the Fifth Circuit's decision. Its failure to do so does not constitute exceptional circumstances. Indeed, All American has offered no justifiable excuse for its tardiness in seeking review by this Court of orders entered eleven and five months ago. Nor has it suggested why it could not have timely sought a writ of certiorari to review those orders. Nor has All American offered any authority permitting a party which took absolutely no action for five months after the rendering of the *third* order dismissing its appeal to seek review by the extraordinary writ of mandamus. Nor is there authority for such review. To the contrary, the purpose of the time limitations imposed by the United States Code and this Court's rules are to ensure there is an end to litigation. *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 63 S. Ct. 1126 (1943) (purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end). A party simply is not permitted to ignore the time limitations and at its whim resurrect, without explanation, litigation its opponents justifiably had assumed had ended. Otherwise, litigation would have no finality.

In short, the circumstances here clearly do not warrant the granting of a writ of mandamus on behalf of a party who has done nothing for five months. Indeed, re-

spondents, who have properly assumed that the litigation with All American was final, would be severely prejudiced by the granting of the writ.[7]

3. The Fifth Circuit Court Of Appeals Properly Dismissed And Denied Reinstatement Of Petitioner's Appeal Pursuant To Rules 3(a) And 10(b) Of The Federal Rules Of Appellate Procedure And Rule 42.3.2 Of The Fifth Circuit's Rules For Failure To Fulfill Its Appellant Responsibilities.

a. The Fifth Circuit Properly Dismissed The Appeal.

All American's appeal was dismissed on August 19, 1987 for want of prosecution based on its failure to order and arrange to pay for the transcript within the time period provided. The order of dismissal was entered three months after the date by which All American was to make such arrangements and two months after the Court admonished All American regarding the consequences for failing to comply with its obligation. The dismissal of All American's appeal was proper.

Rule 42.3.2 of the Fifth Circuit's Rules and Rules 3(a) and 10(b) of the Federal Rules of Appellate Procedure provide for dismissal of an appeal where an appellant fails to fulfill his responsibilities. Fed. R. App. P. 3(a), 10(b); 5th Cir. Loc. R. 42.3.2; *see e.g. Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743 (5th Cir. 1976) (dismissal of appeal for failure to timely obtain record); *Stevens v. Security Pacific National Bank*, 538 F.2d 1387,

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[7] Not only would respondents have to rebrief and reargue the case, they also would have to attempt to recover the proceeds distributed nationwide to the 464 members of the plaintiff class, a difficult, if not impossible task.

1389 (9th Cir. 1976) (failure to file proper brief justifies dismissal); *Business Forms Finishing Service, Inc. v. Carson*, 463 F.2d 966 (7th Cir. 1971) (appeal dismissed for failure to comply with Rules). As explained by a leading commentator on the Federal Rules:

> When an appellant fails to take any of the steps required by the Rules, Rule 3(a) permits the Court of Appeals to take such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal.
>
> 9 Moore's Fed. Practice
> 203.12 at 3-58 (2d ed.) 1987.

Pursuant to these rules, appellate courts have dismissed appeals under less egregious circumstances. In *Taylor v. S & D Enterprises, Ltd.*, 601 F.2d 175 (5th Cir. 1979), the Fifth Circuit dismissed an appeal where the appellant delayed three months and twenty-six days in making satisfactory arrangements for preparation of the transcript, notwithstanding that the appellant timely applied for extensions of time. The court explained:

> It thus appears that, while the notice of appeal was timely filed, three months and twenty-six days passed without any action having been taken by appellants to perfect the appeal. *Thus, the filing of the notice of appeal was treated by appellants merely as a taking of an option to appeal the case should appellants later determine to do so.*
>
> The failure to order the transcript in anything approaching a timely fashion has not been due to excusable neglect, oversight, accident, or other fortuitous events. . . . Under such circumstances, it is appropriate that Rule 10(b), Federal Rules of Appellate Procedure, be invoked and that deliberate failure to abide that Rule result in a denial of the motion for extension of time.

> The second motion to extend the time is DENIED and the appellant's appeal is DISMISSED.
>
> 601 F.2d at 176
> (Emphasis supplied).

In *Taylor,* the appellant's appeal was dismissed three months after filing of the notice, notwithstanding that the appellant had made some effort to attempt to fulfill his obligations and *had timely filed motions for extension of time.* Nevertheless, the court held that the appellant's deliberate failure to abide by the rules justified dismissal.

In like manner, All American's deliberate failure to abide by the rules within four months after filing its notice of appeal, notwithstanding the Fifth Circuit's admonition regarding the consequences for failure to do so, justified dismissal. If in *Taylor* the dismissal was warranted, notwithstanding that the appellant had made some effort to comply with his obligations and at least filed motions for extension, then, *a fortiori,* dismissal was warranted here where All American did absolutely nothing for four months after filing its notice of appeal.

Moreover, All American's total inaction during the four months subsequent to the dismissal further justifies the dismissal. Indeed, as of the date of the filing of its motion to reinstate its appeal, All American neither had made arrangements to pay for its share of the transcript so as to cure the default nor had responded to the Fifth Circuit's warnings. (App. K at A-30).

Further, dismissal of All American's appeal need not rest solely on its failure to order and make financial arrangements to pay for a transcript. Rather, dismissal also was warranted pursuant to Rule 31 of the Federal Rules

of Appellate Procedure for failure to timely file its brief. According to the scheduling order, All American's brief was due on or about October 6, 1987. All American, however, neither timely filed its brief nor sought an extension of time within which to do so. It simply did nothing.

That the other appellants timely sought and obtained extensions of time within which to file their brief provides no comfort to All American. To the contrary, it is well established that where multiple parties appeal, *each* appellant must comply with the requirements for prosecuting an appeal absent a joint appeal. *Woody v. Hinkle Contracting Corp.*, 59 F.R.D. 543 (E.D. Ky. 1973). (If more than one appeal is taken, *each* appellant shall comply with the provisions of Rule 10(b) and this subdivision . . . ; Fed. R. App. P. 11(a)). All American, which neither filed a motion for extension of time nor sought to join in the motions of the other appellants, cannot benefit from the filing of their motions. Accordingly, as of the date All American filed for reinstatement, its brief was two months overdue.

Failure to timely file a brief is ground for dismissal of an appeal. In *Louisiana World Exposition v. Logue*, 746 F.2d 1033, 1038 (5th Cir. 1984), appellants' appeal was dismissed for failure to timely file their brief. The court reasoned that by not filing their brief, appellants abandoned their appeal. *Id.* at 1038. *Accord, Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1972) (pro se appellant's appeal dismissed for failure to timely file brief).

Such reasoning equally applies here. All American took absolutely no action for eight months after filing its notice of appeal. It failed to timely arrange to order

and pay for its share of the transcript. It failed to move to reinstate its appeal dismissal for four months. It failed to timely file its brief, seek an extension within which to do so, or join in the motions filed by the other appellants. As of the date it filed its motion seeking reinstatement, it still had not complied with the rules requiring it to order and arrange to pay for its share of the transcript. It still has not even attempted to file its brief. Under such circumstances, All American should be considered as having abandoned its appeal. Dismissal of its appeal, therefore, was proper.

b. The Fifth Circuit Properly Denied Reinstatement.

The Fifth Circuit also properly denied reinstatement. All American first sought to reinstate its appeal six months after being warned of possible dismissal, four months after dismissal, and only two days before the briefs of the other appellants were due. All American's request came too late and, therefore, properly was denied.

The Fifth Circuit's Rules provide an appellant fifteen days after receipt of notice of possible dismissal for want of prosecution within which to cure the default. 5th Cir. Loc. R. 42.3.1.1. Pursuant to this Rule, All American had to cure its default by July 1, 1987, which was fifteen days from the date notice of possible dismissal was given.

All American failed to cure the default within the fifteen day period. More importantly, All American failed to promptly cure the default after dismissal on August 19, 1987. Indeed, All American waited six months after receipt of the notice of possible dismissal, four months

after dismissal, and two months after its brief was due to take any action to reinstate the appeal. All American's dilatory actions are inexcusable. Under such circumstances, All American's request for reinstatement was untimely.

More importantly, All American offered no justifiable excuse for its flagrant and total disregard of the rules as is required to recall a mandate. 5th Cir. Loc. R. 41.2. The original explanation offered for All American's egregious violations was its unverified contention that eight months were required to resolve its fee and cost arrangements with counsel. Pretermitting for the moment the specious nature of All American's contention, it offered no evidence to substantiate it. All American offered no evidence of any inability to pay fees or costs. Indeed, the evidence adduced at trial established that All American, which was a Bermuda corporation formed to do the transaction at issue and which engaged in no other business, had in excess of $700,000 in its bank account in Bermuda at the time of trial. (App. C at A-18). Surely, this amount is sufficient to obtain competent counsel. In any event, well established procedures exist to enable a party having alleged financial difficulties to proceed on appeal without advancing fees and costs. Fed. R. App. P. 24. These procedures, however, do not permit a party to ignore its appeal for eight months until it determines to proceed.

Abandoning its original excuse, All American argued in a subsequent motion that it somehow was confused because of the filing of several motions. All American's argument simply is unbelievable. No justifiable excuse was established.

In addition to failing to establish a justifiable excuse, All American offered no authority for reinstating an appeal four months after dismissal, nor can it. Respondents found no case which authorizes reinstatement of an appellant's appeal where the appellant took absolutely no action for eight months to perfect its appeal. Nor is there authority for reinstating an appeal dismissed four months earlier where the party failed to promptly move for reinstatement. To the contrary, a failure to timely move for recall of a mandate militates against recall. *Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958) (appelant's unjustified failure to move to recall mandate for eight months militates against recall). In short, no basis in fact or law warranted reinstatement of All American's appeal at such a late date. The Fifth Circuit, therefore, properly denied reinstatement.

All American argues that its appeal should have been reinstated because there was no showing of prejudice. Respondents deny that a showing of prejudice is required to enable a circuit court to dismiss the appeal of an appellant who fails to comply with its prosecutorial obligations. To hold otherwise would divest the circuit courts of control of their dockets.

In any event, respondents established prejudice. Respondents established that reinstatement of All American's appeal at such a late date would delay resolution of an appeal already pending for eight months. Indeed, as of the date the Fifth Circuit first denied reinstatement, the remaining appellants had filed their brief, and respondents' counsel were diligently working to timely prepare their brief addressing the issues of the other appellants.

To have required respondents at that late date to refocus their efforts to oppose the additional appeal of All American would have required respondents to request additional time to prepare their brief, causing further unwarranted delay. Such delay would have been prejudicial to respondents and unjustified, particularly in view of All American's flagrant and total disregard of the court's rules.

Respondents also would have been and will be prejudiced by a late reinstatement of All American's appeal. At the time All American first sought reinstatement, four months had lapsed since the dismissal. Based on the dismissal of All American's appeal four months earlier, All American's failure to timely file its brief two months earlier, and All American's inaction in prosecuting its appeal since filing a notice, respondents already had taken steps to execute on their judgment against All American, which steps include arranging for the sale of certain assets of All American presently held under seizure pursuant to a writ of attachment filed by respondents. In moving to execute on their judgment, respondents were entitled to rely on the dismissal for failure to prosecute entered four months earlier, All American's failure to timely file its brief two months earlier, and All American's general inaction since filing the notice of appeal eight months earlier. A prevailing party is not required to wait indefinitely to execute on a judgment against a party whose appeal has been dismissed over four months earlier. Considering the foregoing, the Fifth Circuit properly denied reinstatement.

The case of *Marcaida v. Industrial Indemnity Ins. Co.*, 569 F.2d 828 (5th Cir. 1978), cited by All American,

does not require a contrary conclusion. There, the court held that where the appellant did not complain, a mere delay of seven days in filing a brief did not justify dismissal. Here, in contrast, respondents as well as one of the appellants did complain of the total inaction of All American that extended far beyond a seven day delay.[8]

All American also argues for the first time that by attempting to require it to comply with the rules, the Fifth Circuit somehow discriminated against it. Specifically, All American contends that because respondents filed a cross-appeal, they should have been made to bear 50% of the transcript cost, notwithstanding that there were four appellants. According to All American, the failure to impose the 50% cost on respondents constitutes discrimination. Significantly, All American cites no authority supporting its contention that cross-appellants must bear one-half of the transcript costs. The argument is specious.

Similarly meritless is All American's argument pertaining to Valley Forge's alleged failure to pay its share of the transcript cost. Valley Forge is the liability insurer of appellant Wright, Lindsey & Jennings and only is present in the suit pursuant to the Louisiana Direct Action Statute permitting insurance companies to be named directly. Throughout the proceedings below, until after the filing of the notices of appeal and transcript orders, Valley Forge and its insured were represented by the same

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[8] Fryar's counsel first complained to the Fifth Circuit regarding All American's failure to agree to pay its share of the transcript costs after the transcript had been ordered, advising the Clerk that Fryar would not agree to an increase in his costs because of All American's failure. (Petitioner's App. H at A-24).

counsel. Although separate counsel ultimately was retained, one counsel prepared the brief for both appellants (with the exception of a five page brief considering coverage issues) and one counsel argued for both appellants at oral argument. To attempt to characterize Valley Forge and its insured as two distinct appellants is misleading.

In any event, if All American was discriminated against by the failure to require Valley Forge to bear a pro rata share of the costs, it should have complained earlier when first admonished by the Fifth Circuit. Its failure to timely do so precludes reinstatement of the appeal. *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277-278 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S. Ct. 2042 (1972) (power to recall mandates should not be availed of for the purpose of changing decisions out of time even assuming the wisdom of the decision entered has become doubtful). Thus, the wisdom of the Fifth Circuit's decision dismissing the appeal is irrelevant at this late date.

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X.

CONCLUSION

The Court lacks jurisdiction to consider All American's untimely petition filed eleven months after dismissal of its appeal and six months after the second order denying reinstatement.

Further, All American has failed to establish entitlement to the extraordinary remedy of mandamus. Finally,

the Fifth Circuit properly dismissed and denied reinstatement of All America's appeal.

Respectfully submitted,

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28 U.S.C. § 2101. Time for Appeal.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been

rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Supreme Court Rule 20. Review on Certiorari—Time for Petitioning.

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U.S.C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5. A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

Federal Rule of Appellate Procedure 3(a). Notice of Appeal.

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Federal Rule of Appellate Procedure 10(b). Ordering Transcript.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

Supreme Court Rule 26. Considerations Governing Issuance of Extraordinary Writs.

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Supreme Court Rule 27. Procedure in Seeking An Extraordinary Writ.

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3(b) of this Rule), are filed with the Clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time. The petition shall be as short as possible, and in any event may not exceed 30 pages.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other

party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

.3. (a) If the petition seeks issuance of a writ of habeas corpus, it shall comply with the requirements of 28 U.S.C. § 2242, and in particular with the requirement in the last paragraph thereof that it state the reasons for not making application to the district court of the district in which the petitioner is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, it must be shown that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in any other form or from any other court. Such writs are rarely granted.

(b) Proceedings under this paragraph .3 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If a response is ordered,

it shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. Neither denial of the petition, without more, nor an order of transfer under authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

.4. If the petition seeks issuance of a common-law writ of certiorari under 28 U.S.C. § 1651(a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall follow insofar as applicable, the form for a petition for certiorari prescribed by Rule 21, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process. The respondent, within 30 days after receipt of the petition, may file 40 copies of a brief in opposition, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit.

.5. When a brief in opposition under paragraphs .2 and .4 has been filed, or when a response under paragraph .3 has been ordered and filed, or when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the cause set down for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the

case involves a petition for common-law certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 30.

Fifth Circuit Local Rule 42.3.2

In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the Court, the Clerk shall enter an order dismissing the appeal for want of prosecution.

Federal Rule of Appellate Procedure 31. Filing and Service of Briefs.

(a) *Time for Serving and Filing Briefs.* The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) *Number of Copies to Be Filed and Served.* Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of

the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) *Consequence of Failure to File Briefs.* If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970; March 10, 1986, eff. July 1, 1986.)

Federal Rules of Appellate Procedure 11(a). Duty of Appellant.

After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

Fifth Circuit Local Rule 42.3.1.1

Appeals With Counsel. If appellant is represented by counsel, appointed or retained, the Clerk shall issue a notice to counsel that, upon expiration of 15 days from the date thereof, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and shall enter an order directing counsel to show cause within 15 days from the date thereof why disciplinary action should not be taken against counsel. If the default is remedied within that time the Clerk shall not dismiss the appeal and may refer to the Court the matter of disciplinary

action against the attorney. If the default is not remedied within that time the Clerk may enter an order dismissing the appeal for want of prosecution or may refer to the Court the question of dismissal. The Clerk shall refer to the Court the matter of disciplinary action against the attorney. The Court may refer the matter of disciplinary action to a District Judge to act as a special master.

Fifth Circuit Local Rule 41.2

Recall of Mandate. A mandate once issued shall not be recalled except to prevent injustice.

Federal Rule of Appellate Procedure 24. Proceedings in Forma Pauperis.

(a) *Leave to Proceed on Appeal in Forma Pauperis From District Court to Court of Appeals.* A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an

action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(b) *Leave to Proceed on Appeal or Review In Forma Pauperis In Administrative Agency Proceedings.* A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly

in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

(c) *Form of Briefs, Appendices and Other Papers.* Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; March 10, 1986, eff. July 1, 1986.)

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EDWARD C. ABELL, JR. AND
CAREY WALTON

Plaintiffs/Appellees

VERSUS NUMBER 87-4260

JOE E. FRYAR,

Defendant/Appellant

MOTION FOR REINSTATEMENT OF APPEAL

Now comes defendant-appellant, ALL AMERICAN SERVIVES COMPANY, LTD., by and through undersigned counsel, and for this, its motion to reinstate appeal, states as follows:

1.

Movant herein, filed a timely Notice of Appeal in the above entitled action on April 22, 1987. Undersigned counsel filed the Notice of Appeal as a courtesy for the mover pending resolution of negotiations regarding attorney fee and expenses. The issue of fee and expenses has finally been resolved.

2.

In the interim, attorneys for the plaintiff requested that this Honorable Court dismiss the appeal of the mover in that arrangements had not been made with the court reporter of the district court to order the transcript, pursuant to F.R.A.P. 42, Local Rule, 42.3.2. By Order of

August 19, 1987, the clerk of the court of appeal in fact did dismiss the appeal of All American Services Company, Ltd.

3.

In the intervening time since the dismissal of All American's appeal, numerous motions have been filed by the other parties herein, and considered by the district court and the court of appeals.

4.

In addition, the record has been lodged; the transcript prepared; and it is currently making the rounds to all counsel for preparation of briefs, which undersigned counsel understands are due on or before December 6, 1987.

5.

Upon information it is believed that in order to have the appeal of All American reinstated, All American will have to make arrangements to pay to either the court reporter or counsel for other appellants to pay its prorata share of the cost of the transcript filed with the court. Those arrangements are being made.

6.

In that it is alleged that there will be no prejudice to any of the parties to the appeal if the appeal of All American is reinstated, it is respectfully submitted that this court should enter an order reinstating the appeal of All American once all fees and costs are ascertained and paid.

WHEREFORE, ALL AMERICAN SERVICES COMPANY, LTD. respectfully moves this court to enter an

order reinstating the appeal of All American Services Company, Ltd.

Respectfully submitted,

CHRIS J. ROY
(A LAW CORPORATION)

BY: /s/ Leslie R. Leavoy, Jr.
Leslie R. Leavoy, Jr.
711 Washington Street
Alexandria, Louisiana 71301
(318) 487-9537

CERTIFICATE

I hereby certify that a copy of the above and foregoing Motion for Reinstatement of Appeal has been furnished to all counsel by placing same in the United States mail properly addressed with sufficient postage on this 2nd day of December, 1987.

Alexandria, Louisiana.

/s/ Leslie R. Leavoy, Jr.
OF COUNSEL

APPENDIX B

MOTION FOR RECONSIDERATION OF MOTION FOR REINSTATEMENT OF APPEAL AND/OR ALTERNATIVELY, MOTION FOR SUSPENSION OF RULES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 2

NOW COMES defendant/appellant, All American Services, Ltd., by and through undersigned counsel, and respectfully requests this court to reconsider the motion for reinstatement of the appeal of All American Services, Ltd., and/or alternatively, motion for suspension of rules pursuant to Federal Rule of Appellate Procedure 2 for the reasons that appear in the memorandum filed with this motion.

Respectfully submitted,

/s/ Leslie R. Leavoy, Jr.

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been furnished to all counsel of record by placing same in the United States mail properly addressed with sufficient postage on this 11th day of January, 1988.

/s/ Leslie R. Leavoy, Jr.
OF COUNSEL

APPENDIX C

January 20, 1987 Transcript of Trial Proceedings (pp. 12-13). Testimony of Janice Stephens.

* * *

Q That was in October of 1986?

A That's correct.

Q At that time, was any interest paid on the $800,000.00 in bonds?

A Yes. There were funds to pay a total of a hundred one thousand three eighteen forty on that eight hundred thousand at the time that those bonds are exchange had for register.

Q Prior to that date have any interest payments been made, to your knowledge, on the $800,000.00 in bonds?

A Prior to that date?

Q Prior to the October, '86 payment of a hundred thousand?

A I have one check that was found on the Bossier Bank & Trust records that shows on October 20th, 1983 fifty-six thousand which would have been one interest payment on eight hundred thousand at fourteen percent.

* * *

THE WITNESS: Yes, sir. This wire transfer that paid this fifty-six thousand shows that it was paid on 10/20/83 to Colonial Development, and it lists the same bond numbers that they turned in for the registered bonds.

* * *

APPENDIX D

March 26, 1987 Ruling on Motions for Judgment Notwithstanding the Verdict and Motions for New Trial (pp. 16, 19, 20, 27)

* * *

(page 16) Substantial evidence was adduced at trial from which a reasonable jury could infer the existence of a scheme or artifice to defraud. It is obvious that Fryar caused All American to be organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property. Fryar was the only party in contact with All American, and it was Fryar who caused the documents necessary to effectuate the scheme to be mailed to All American and to other parties involved in the transaction.

The evidence at trial abundantly supported the jury's finding that Fryar violated Section 1962(a) of the RICO Act. It is clear that Fryar and All American derived in excess of $2 million from the pattern of racketeering activity which resulted from the issuance of the Westside bonds. It is also well established that at least $2.4 million of the racketeering monies was used by Fryar and All American to acquire an interest in Westside by the purchase of Westside bonds, and that at least part of the proceeds of that investment, the interest payments, were paid to Fryar, who was operating Westside.

(pp. 19-20) Fryar fomented more fraud to assure the success of his scheme. To secure performance of his obligations as developed under the Development Agreement, Fryar agreed to purchase and to pledge bonds in an aggregate principal amount of $2 million. Fryar thus appeared

to have $2 million of his *own* funds at risk, as security for the performance of his obligations, an appearance he expressly included in the Summary Memoranda, the "Red Herring", and other sales circulars which were distributed to potential investors.

Fryar then grossly inflated the price to be paid by Westside so that over $2 million would be realized from the bond proceeds, which profit would be used to purchase the $2 million of bonds Fryar was required to pledge as security. Structuring the transaction in this manner relieved Fryar of the obligation to put his own funds at risk to secure his performance. It also enabled Fryar and All American to receive a substantial additional profit in the form of the bonds. Fryar's and All American's assertions that the payment to All American of $2,459,000 was payment for All American's assumption of Fryar's obligations pursuant to the Development Agreement is completely belied by the evidence adduced at trial. As was indicated above, these pseudo-obligations on the part of All American were set forth in a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial.

* * *

(page 27) Moreover, as the court discussed above, evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar in consideration for All American's receipt of $2,459,000 for a piece of property that cost it $150,000, was a letter from All American Services Co., Ltd., which letter mysteriously appeared, dated November, 1981, agreeing in part to buy the property *which it had already purchased in August of 1981.* An-

other document relied upon by defendant Fryar was a copy of a resolution of All American Services Co., Ltd., setting forth All American's obligations. No original of this document could be found and the document was not produced when plaintiffs' first demanded it during discovery. This document is very strange in view of the fact that Mr. Chambers, who was President of All American, testified by deposition prior to his death that the only obligation that All American owed to Joe Fryar was to pledge the $2 million in bonds to the trustee for Westside to secure Fryar's obligation.

* * *

APPENDIX E

Desposition of Maxwell Lowrey Quin taken October 27, 1986 (Vol. I, p. 133)

* * *

Q. But as you understood its purpose, it was solely for purposes of the Westside transaction.

A. Correct.

Q. And it's had no other business other than that transaction?

A. Not to my knowledge.

* * *

APPENDIX F

Deposition of Patricia Lodge taken January 19, 1987 (pp. 42-43, 45)

Q. But again, there was no other employee in the office other than yourself?

A. No.

* * *

Q. And am I correct that there are no other employees of All American Services Company, today, other than you?

A. That is right.

* * *

Q. After you assumed your job as secretary to Mr. Chambers in January of 1983, did you become familiar with that transaction at all?

A. No, I didn't.

Q. Have you, at any time up to and including today, been made aware of the transaction?

A. I am aware of it, but I don't fully understand it. I don't even pretend to understand it.

APPENDIX G

Deposition of Maxwell Lowrey Quin taken October 27, 1986 (Vol. I, p. 50)

* * *

Q. Can you describe the ownership breakdown for me?

A. Yes. The company is owned by a company called J. Herbert Smithers (spelled phonetically), L T D.

Q. That is a Cayman corporation?

A. Cayman corporation. Yes.

* * *

APPENDIX H

TO MAX RE: FLEMING

THE TRIAL IS A CIVIL ACTION AND OCCURS ON DECEMBER 1, 1986. IT IS NOT CRIMINAL—FLEMING DOES NOT HAVE TO TESTIFY AND SHOULD NOT.

FLEMING SHOULD RESIST BEING DEPOSED. HARGAN IS ACQUAINTED WITH THE CASE AND SHOULD PRESENT HIM. THE FOLLOWING POINTS ARE MADE:

1. A.A. IS AN EXEMPT COMPANY AND SHOULD BE PROTECTED BY BERMUDA'S SECRECY LAWS.
2. FLEMING HAS A DUTY AND OBLIGATION OF CONFIDENTIALITY REGARDING HIS CLIENTS AND BUSINESS RECORDS.
3. FLEMING HAS NO RIGHT TO POSSESS ANY ORIGINALS, COPIES, CORRESPONDENCE, RECORDS OR RECOLLECTIONS PERTAINING TO A.A. AND SHOULD IMMEDIATELY SURRENDER ANY THAT HE HAS TO THE COMPANY AND FORGET ANYTHING THAT HE RECALLS.
4. TESTIMONY RELATIVE TO FUNDING A.A. VIA ANGLO AND FRYAR'S INVOLVEMENT WITH ANGLO WOULD BE VERY DAMAGING TO A.A.'S EFFORTS TO RECOVER THE BONDS.
5. ANY LOSS THAT A.A. SUFFERS BECAUSE OF FLEMING'S RECORDS, TESTIMONY OR VIOLATING THE CONFIDENTIALITY OF A.A.'S BUSINESS WILL CAUSE A.A. TO SEEK ECONOMIC RECOVERY VIA LEGAL ACTION AGAINST FLEMING.

6. IF HE AVOIDS BEING DEPOSED OR UPON BEING DEPOSED, RESPECTS THE CONFIDENTIAL RELATIONSHIP BETWEEN HIMSELF AND A.A., THEN HE CAN EXPECT TO RETAIN A GOOD AND GENEROUS CLIENT. BUT IF HE DIVULGES OUR BUSINESS, THEN IT WILL BE INCUMBENT ON A.A. THRU THE COURTS TO LET HIS PRESENT AND FUTURE CLIENTS KNOW THE LOOSENESS WITH WHICH THEIR BUSINESS DEALINGS ARE HANDELED. THIS WILL HARDLY INSPIRE CONFIDENCE IN CLIENTS OF FLEMING.

J. H. SMITHERS

APPENDIX I

January 21, 1987 Transcript of Trial Proceedings (p. 80)

* * *

THE COURT: Well, I'm just talking. I say, it would have had to have come from Bermuda.

MR. SIMON: Why do you say that?

THE COURT: Where else could it have come from?

MR. WITTMANN: This document I'm talking about that Ms. Lodge identified, this was a letter sent to Kyle Schonekas from Owen Goudelocke—

THE COURT: But my question, before I hear the rest of the evidence, insofar as the jury's concerned, evidence that's relevant and admissible may be excluded because the prejudicial effect outweighs the probative value. Now, this indicates something, and may be very important to other people outside of this, that someone was trying to keep maybe a witness from testifying.

* * *

APPENDIX J

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 28, 1987

GILBERT F. GANUCHEAU
Clerk

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Mr. J. Minos Simon
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Mr. D. Mark Bienvenu
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Mr. Leslie R. Leavoy
Attorney at Law
711 Washington St.
Alexandria,
LA. 71301

No. 87-4260 EDWARD C. ABELL, JR., ET AL.,
—vs— POTOMAS INSURANCE CO.
ETC. ET AL.,

(CA-84-1786 "O")

Pursuant to Rule 12 of the Federal Rules of Appellate Procedure, you are hereby notified that the record on appeal has this day been filed. THE BRIEF FOR APPELLANT AND RECORD EXCERPTS ARE NOW DUE WITHIN FORTY (40) DAYS FROM THIS DATE in accordance with Rule 31 FRAP. See FRAP and Local Rules 28 and 31 as to the content of and time for filing briefs. See Local Rule 30.1 for the contents of the Record Excerpts which are to be filed in lieu of an appendix. Local Rule 42.3.2 allows the clerk to dismiss appeals without notice if the brief is not timely filed.

☐ If the *97* volume record on appeal is needed to prepare your brief, it will be made available to you upon written request.

☐ Enclosed is the original record for your use in preparing your brief and the excerpts above referred to

This record may be forwarded to opposing counsel at the time your brief is served as long as we are informed of its transmission. Opposing counsel will then be required to return the record to this office. Otherwise, you should return the record to this office with your brief. Please note that we are authorized to loan official government records and exhibits only for your convenience. Special care should be taken for their safe handling and return. The willful mutilation, obliteration, or destruction of U.S. Court records in your custody is a criminal act (18 USCA § 2071).

☐ This letter will also serve as a reminder of the Court's plan for expediting criminal appeals wherein you are expected to file your brief within the period fixed by the rules without requesting an extension. FOR THE BENEFIT OF COUNSEL IN MULTIPLE PARTY CASES, ACCESS TO THE RECORD WILL NOT BE CONSIDERED GROUNDS FOR EXTENDING THE TIME FOR THE FILING OF THE BRIEF.

Sincerely yours,

cc. Mr. Phillip A. Wittman

GILBERT F. GANUCHEAU,
Clerk

By: /s/ P. Keller
Deputy Clerk

APPENDIX K

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned notary public, personally came and appeared:

JUDY Y. BARRASSO

who, after being duly sworn, did depose and say that:

1. She is counsel for the plaintiffs in the proceeding: *Edward C. Abell, Jr., et al. v. Potomac Insurance Company of Illinois, et al.* No. 87-4260 presently pending in the Fifth Circuit Court of Appeals.

2. In that capacity she had a conversation on December 4, 1987, with Connie Ezel, the court reporter responsible for transcribing the trial of this matter which was held in the Opelousas division of the Western District of Louisiana.

3. During this conversation on December 4, 1987, Ms. Ezel advised that as of that date All American had not made arrangements to pay for its share of the transcript of these proceedings.

/s/ Judy Y. Barrasso
Judy Y. Barrasso

Sworn to and subscribed before me
this 9th day of December, 1987.
/s/ David J. Lukinovich
Notary Public

No. 88-152

In The
Supreme Court of the United States

—o—

IN RE: All American Services, Ltd.,
Petitioner

—o—

ON WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

REPLY TO BRIEF IN OPPOSITION

—o—

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Baton Rouge, Louisiana 70808

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Counsel of Record

September 17, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF AUTHORITIES

REPLY TO BRIEF OF RESPONDENTS

Pursuant to Rule 22.5, petitioner, All American Services, Ltd., files this reply to respondents' brief in opposition.

First. Respondents' brief in opposition materially mistates the law. Petitioner has not applied to this Court for the exercise of its certiorari jurisdiction pursuant to Rule 20, as respondents say in their brief (p. 2). Rather this is an application for mandamus or common law certiorari under this Court's Rule 27 and pursuant to the All Writs Statute, 28 U.S.C. § 1651. It is well settled that mandamus or "common law certiorari," as Professor Moore calls it, 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26, p. 278 (1987), lies to "compel [an inferior court] to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943); *Will v. United States,* 389 U.S. 90, 95 (1967).

In reference to the common law writ of certiorari, this Court has stated that § 1651

> "affords ample authority for using the writ as an auxillary process and, whenever there is imperative necessity therefor, as a means of . . . giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways."

United States v. Beatty, 232 U.S. 463, 467 (1914).

Our position is that the Fifth Circuit's dismissal of petitioner's appeal was a plain abuse of discretion and a denial of its "existing appellate authority" resulting in the deprivation of petitioner's property—some three million dollars—without due process of law. Surely where the

costs of transcript preparation have been paid, where the transcript has been lodged with the Court of Appeals, where the reporter's fee has been satisfied, and where petitioner tendered payment therefor, it is an abuse of discretion for the appellate court to dismiss a timely noticed appeal. "Machine-like rigidity cannot be the final goal of judicial administration." 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26 p. 276 (1987). Furthermore, the label applied to our request for extraordinary writs—either "mandamus" or common law "certiorari"—is unimportant. 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26 p. 282 (1987), citing *Ex parte Simmons,* 247 U.S. 231 (1918).

A. Respondents say in their brief (p. 15) that no authority exists permitting issuance of mandamus to compel an appellate court to entertain an appeal improperly dismissed below. To the contrary, both Chief Justice White and Chief Justice Hughes exercised precisely such authority for a unanimous Court in *Ex Parte Abdu,* 247 U.S. 27 (1918) and in *In re 620 Church St. Corp.,* 299 U.S. 24 (1936). In the former case, the Court issued a peremptory writ to compel the court of appeals to permit the filing of the appellate record without the prepayment of costs. Chief Justice White spoke of "[l]ooking . . . through form to the essence of things," 247 U.S. at 29, an approach which if applied here certainly suggests that petitioner has been denied its day in the Fifth Circuit.

Later, in *House v. Mayo,* 324 U.S. 42, 44 (1945), this Court said of § 262 of 28 U.S.C., the predecessor of the All Writs Act, 28 U.S.C. § 1651:

> "By virtue of that section we may grant a writ of certiorari [common law certiorari] to review the ac-

> tion of the court of appeals in declining to allow an appeal to it."

B. The time bar urged by respondents in their brief (pp. 2, 13) does not apply to petitioner's application for extraordinary writs. "There are no time limitations specified in statute or rule for filing in the Supreme Court an application for one of the extraordinary writs, such as mandamus, . . . or common-law certiorari." STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986), p. 304.

As for the required "exceptional circumstances warranting the exercise of the Court's discretionary powers" under this Court's Rule 26, we rely on

> " 'intervening circumstances of substantial . . . effect,' justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.' "

Gondeck v. Pan American Airways, 382 U.S. 25, 26-27 (1965). *Accord, United States v. Ohio Power Co.,* 353 U.S. 98 (1957); *United States v. Maryland for the Use of Meyer,* 382 U.S. 158 (1965).

Pinter v. Dahl, 56 U.S.L.W. 4579 (U.S. June 15, 1988), was decided by this Court and the Fifth Circuit invited the other appellants to submit "letter briefs . . . on the applicability, if any, to this case of *Pinter v. Dahl.*" This "intervening circumstances of substantial . . . effect," the change in the substantive law defining a seller of securities within Section 12(1) of the Securities Act, required petitioner's application for extraordinary writs, which was filed July 25, 1988. The respondents' submis-

sion to the Fifth Circuit's invitation admits that the trial judge's jury charge defining "a seller"—a necessary prerequisite to § 12(1) liability—is erroneous. There is every reason to anticipate a reversal by the Fifth Circuit will be mandated by this Court's ruling in *Pinter*.

Second. Two material mistatements of fact taint respondents' brief in opposition.

A. Respondents say in their brief (p. 18) that All American "neither had made arrangements to pay for its share of the transcript so as to cure the default nor had responded to the Fifth Circuit's warnings." This is false and respondents know it.

Petitioner sent $1,206.38 each (see App. A, B and C, *infra*, pp. 1, 2, 3 and 4) to counsel for Fryar, WLJ, Valley Forge, and respondents. Only respondents refused payment (see App. D, *infra*, p. 5).

B. Respondents also say in their brief (p. 20) that All American "still has not even attempted to file its brief." This is plainly false and respondents know it.

Petitioner twice filed an original brief, serving respondents, with the Clerk of the Fifth Circuit (see App. E, *infra*, p. 6), once on December 10, 1987 while petitioner's original motion to reinstate the appeal was pending. Next, on January 11, 1988, petitioner refiled its original brief on the merits with its motion for reconsideration of the Fifth Circuit's dismissal of its appeal. The Fifth Circuit failed to address petitioner's request for suspension of its rules under FRAP 2. The Clerk of the Court of Appeals refused to file petitioner's brief on both occasions and returned it to counsel.

CONCLUSION

We respectfully submit that the interests of justice require this Court to issue a peremptory writ of mandamus to the Fifth Circuit Court of Appeals reversing its dismissal of petitioner's appeal and requiring the Fifth Circuit to consider petitioner's appeal along with those of Fryar, Wright, Lindsey & Jennings, and Valley Forge.

The Fifth Circuit should be ordered to receive petitioner's brief, twice previously attempted to be filed with the Fifth Circuit, and the case should be adjudicated on the record currently lodged in the Fifth Circuit. Petitioner makes no request for oral argument in the Fifth Circuit.

Respectfully submitted,

PAUL R. BAIER
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CHRIS J. ROY
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711 Washington Street
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Telephone: (318) 487-9537

Counsel of Record

September 17, 1988

APPENDIX A

December 10, 1987

Mr. Phillip A. Wittmann
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130-3588

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - No. 87-4260

Dear Mr. Wittmann:

Although I have spoken with you and Ms. Barrasso regarding reimbursement to the plaintiffs by All American of its share of the cost of the transcript on appeal, we have not yet learned the exact amount the plaintiffs paid to the Court Reporter.

Nevertheless, in speaking with counsel for the other parties, it was learned that Joe Fryar and Wright, Lindsey & Jennings have paid a total of $4,825.50 each for their pro rata share. Consequently, we multiplied that number by three, and derived at a total of $14,476.50. When we divide that number by four, the pro rata share of each of the parties would be $3,619.12. The difference between each amount paid by Fryar and Wright, Lindsay & Jennings, and their actual pro rata share is $1,206.38.

Assuming the pro rata share of the cost of the transcript for the plaintiff was the same or similar to that of Fryar and Wright, Lindsay & Jennings, we are hereby tendering payment of $1,206.38 to you, as counsel for the plaintiffs, to reimburse the partial pro rata share of All American, which each party has apparently absorbed.

Please let me know at your earliest convenience whether or not this amount is sufficient, or constitutes an overpayment.

With kindest regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.

APPENDIX B

December 10, 1987

Mr. J. Minos Simon
Attorney at Law
Post Office Box 52116
Lafayette, Louisiana 70505

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - NO. 87-4260

Dear Mr. Simon:

As per our telephone conversation apropos the cost of the transcript on appeal in this case, it is my understanding that your client, Joe E. Fryar, has paid $4,825.50 to the Court Reporter for his pro rata share of the cost. Assuming that the plaintiffs and Wright, Lindsey & Jennings have paid the Court Reporter a similar amount, we multiplied that cost times three for a total of $14,476.50. When that number is divided by four, which would presume All American's participation in sharing the cost, each party should have paid $3,619.12.

I am enclosing a check in the amount of $1,206.38, made payable to your client at your direction for reimbursement of part of All American's pro rata share of the cost of the transcript.

Please let me know if this is sufficient, and if not, we will make arrangements to have our client pay any additional amount.

With kindest regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.

lhm
enclosure

APPENDIX C

December 10, 1987

Mr. D. Mark Bienvenu
Attorney at Law
Post Office Box 3527
Lafayette, Louisiana 70502-3527

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - NO. 87-4260

Dear Mr. Bienvenu:

As per our telephone conversations regarding the cost of the official transcript on appeal in this case, please find enclosed payment in the amount of $1,206.38. We have tendered payment in the same amounts to the plaintiffs and Joe Fryar.

It was learned in our discussions with counsel for Fryar and you that payments had been made by Fryar and Wright, Lindsey & Jennings in the amount of $4,825.50 each for the official transcript. Assuming that the plaintiffs paid the same or similar amount, we multiplied $4,825.50 times three, for a total of $14,476.50. When we divide that number by four, each party's pro rata share should be $3,619.12. The tendered payment enclosed represents the difference between what your client was required to pay for the official transcript, and what they should have paid.

Please let me know if this payment is sufficient, and with kind regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.
lhm
enclosure

APPENDIX D

December 11, 1987

Leslie R. Leavoy, Jr., Esq.
Post Office Box 1911
Alexandria, Louisiana 71301

Our file number
54,347

Re: Edward C. Abell, Jr., et al. v. Potomac Insurance Company of Illinois, et al.

Dear Mr. Leavoy:

I enclose herein your check of $1,206.38 transmitted by letter dated December 10, 1987. We return the check because as of the present date, All American Services Company, Ltd.'s appeal has not been reinstated by the Fifth Circuit Court of Appeals. Moreover, as set forth in our Memorandum in Opposition to the Motion to Reinstate, we strongly oppose the reinstatement.

Further, the amount tendered appears to be incorrect according to conversation recently had with the court reporter. Ms. Ezell advises that Stone, Pigman has paid her the amount of $7,111.50 for the transcript prepared in connection with the above referenced matter. Accordingly, the amount tendered is substantially less than the amount of the pro rata share that should have been borne by All American if it had intended to prosecute its appeal.

With kind regards,

Sincerely,

/s/ Judy Y. Barrasso
Judy Y. Barrasso
Of STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON

JYB/cb
Enclosure

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER 87 4260

EDWARD C. ABELL, JR. and CAREY WALTON, et al,
PLAINTIFFS-APPELLEES,

VERSUS

JOE E. FRYAR,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF LOUISIANA
HONORABLE JOHN M. SHAW, JUDGE PRESIDING

ORIGINAL BRIEF ON BEHALF OF DEFENDANT-
APPELLANT ALL AMERICAN SERVICES
COMPANY, LTD.

CHRIS J. ROY (A LAW CORPORATION)
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana
71301

LESLIE R. LEAVOY, JR.

I. CERTIFICATE OF INTERESTED PERSONS

I, LESLIE R. LEAVOY, JR., counsel of record for Appellant, ALL AMERICAN SERVICES COMPANY, LTD., certify that the following list of persons have or may have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusals pursuant to Local Rule 13(a).

Mr. Michael H. Rubin, 1400 One American Place, Baton Rouge, Louisiana 70825, former attorney for All American Services Company, Ltd.;

Mr. Phillip Wittman, and the 50 members of the Law Firm of Stone, Pigman, Walther, Wittman & Hutchinson, 436 Carondelet Street, New Orleans, Louisiana, attorneys for plaintiff;

Mr. Mark Bienvenu, Post Office Box 3527, Lafayette, Louisiana, Attorney for Valley Forge Insurance Company;

Mr. J. Minos Simon, 4108 West Pinkhood Road, Lafayette, Louisiana 70505, Attorney for Joe E. Fryar;

Mr. Ed Gay, 50th Floor, One Shell Square, New Orleans, Louisiana, Attorney for Wright, Lindsey & Jennings;

Mr. Joe E. Fryar, Alexandria, Louisiana;

Mr. Edward C. Abell, Jr., and the 47 members of the law firm of Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, Louisiana;

Mr. Carey Walton, Opelousas, Louisiana;

Potomac Insurance Company of Illinois, Chicago, Illinois;

Mr. Rodney Kendrick, Alexandria, Louisiana;
Hancock, Joseph & Daniels, Little Rock, Arkansas;

Mr. Joseph D. Hancock, Little Rock, Arkansas;

Swink & Company, Inc., Little Rock, Arkansas;

Wright, Lindsey & Jennings, Little Rock, Arkansas;

Mr. William E. Skye, Alexandria, Louisiana;

Mr. John W. Peck, Cincinnati, Ohio;

Peck, Shaffer & Williams, Cincinnati, Ohio;

National Union Fire Insurance Company, Pittsburg, Pennsylvania;

All Bondholders of Westside Habilitation Center Bonds, that are members of the Class.

/s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.

II. STATEMENT REGARDING ORAL ARGUMENT

Because the issues raised on this appeal state substantial and meritorious issues, appellant, All American Services Company, Ltd., by and through undersigned counsel, respectfully requests oral argument be allowed.

CHRIS J. ROY (A LAW CORPORATION)

BY: /s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana 71301
(Area 318) 487-9537

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TABLE OF CITATIONS

CASES

V. STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1291, in that the judgment herein involved represents a final order of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division.

ADOPTION OF BRIEF FILED BY JOE E. FRYAR

All American Services Company, Ltd. adopts by reference the brief filed by defendant-appellant, Joe E. Fryar, as it pertains to the merits of the plaintiff's claims against the defendants, Fryar and All American. Having reviewed Fryar's submission of the Statement of the Case, including the summary of district court proceedings, the Statement of the Facts, and the claims of the plaintiffs as well as Fryar's arguments directed to the merits of the jury's verdict, All American sees no reason to burden the appellate record of this case with a further recitation of that which is already before this court.

SUMMARY OF THE STATUS OF THE APPEAL OF ALL AMERICAN SERVICES COMPANY, LTD.

A timely notice of appeal was filed on behalf of All American Services Company, Ltd. on April 22, 1987. By order of August 19, 1987, the Clerk of Court for the United States Court of Appeals for the Fifth Circuit dismissed the appeal of All American pursuant to request of counsel for the plaintiffs in that apparently no arrangements had been made by All American to order the transcript of the trial. F.R.A.P. 42, Local Rule 42.3.2.

On December 2, 1987, a motion for reinstatement of appeal was filed by All American.

Paragraph 5 of the motion for reinstatement indicates that arrangements were being made to reimburse counsel for other appellants for All American's pro rata share of the cost of the transcript filed with this court. In furtherance of that endeavor, All American, through undersigned counsel, has tendered payment as reflected by Exhibits 1, 2 and 3 attached hereto.

In that there can be no showing of prejudice to any of the parties to the appeal if the appeal of All American in reinstated, and considering the extreme prejudice that would be suffered by All American should its appeal not be reinstated, it is respectfully submitted that a resolution to this matter requires the participation of all parties concerned.

A NEW TRIAL IS REQUIRED

The lengthy trial of this case came to an end on February 4, 1987, with the jury's verdict in favor of the plaintiffs.

On that morning, the very same morning that the jury began its deliberations, the court assembled all counsel in chambers before those deliberations and informed counsel that two of the jurors, namely Kent Terracina and Rita Teer, were going to be discharged by the court and replaced by the two alternate jurors. Without elaborating any further, the court discharged those two jurors. The case on the merits was then submitted to the jury for their deliberations and verdict.

After this jury reached and rendered its verdict, the court again assembled all trial counsel in chambers and each juror (except for Terracina and Teer) was individually placed under oath and questioned by the court regarding any knowledge he or she may have had of improper outside influence directed to themselves or any other juror. Each juror denied any knowledge of any outside influence on themselves or any other juror. When specifically questioned concerning their individual suspicions of the reason for the discharge of jurors Terracina and Teer, each juror testified that the court's action in discharging the two jurors had no effect on them because they thought it was part of the normal course of events. Upon completion of their individual testimony in chambers, each of the jurors was placed in the custody of federal law enforcement officials who were obviously conducting an investigation of possible jury tampering. As this court is aware, one of the defendants in this case, Joe E. Fryar, has been indicted by a United States Grand Jury for jury tampering.

After the federal law enforcement officials had apparently interviewed the jurors, the court again assembled trial counsel in chambers on the afternoon of February 4,

1987. Each juror, interviewed individually, was reminded that they were still under oath, or in fact, they were actually placed under oath again. This time, when the court questioned each juror, the story changed. This was true of each of the jurors interviewed, with the exception of juror Vidrine. Contrary to their earlier sworn testimony, each juror admitted that he or she had lied to the court during the first interview. They admitted that they had, in fact, been made aware of allegations of outside influence on at least one juror, that being juror Terracina. Each knew that juror Terracina was telling certain other jurors that he had been approached by someone purportedly acting on behalf of Fryar, and that he, Terracina, had been offered $10,000.00 to vote for a verdict that would be favorable to Fryar. It was learned during this interrogation of the individual jurors that juror Terracina had actually written a note disclosing the alleged offer of a bribe and shown it to at least one other juror.

Thus, for the court, and also for assembled counsel, the inquiry sought to discover the reason these jurors had lied to the court and counsel during the initial examination before the jurors were questioned by federal law enforcement officials. To an individual, the jurors, who now protested that they were telling the whole truth, stating that they did not believe juror Terracina's reports of an alleged bribe. More importantly, the jurors feared that disclosure of the bribe offer would result in a mistrial. The jurors' desire to proceed with the deliberations in the case and to reach a verdict was so intense that, as learned during this second voir dire in chambers, they actually, knowingly and voluntarily entered into a secret agreement with one another to conceal what they had heard and seen from the

court and the parties to the case. They must have thought that if they did not divulge what Terracina had said and written, no one would have been the wiser, and the case would have come to a conclusion. They obvoiusly did not know that the court was aware that something was ongoing. The resolve with which each of the jurors, maybe with the exception of Vidrine, held to their positions can somewhat be appreciated considering that each of the jurors, again maybe with the exception of Vidrine, was willing to commit perjury when asked directly by the trial judge whether or not they knew of any possibility of improper outside influence on them. It cannot be argued that the jurors did not realize the significance of these events. The seriousness of an alleged offer to bribe a juror or jurors, whether true or not, cannot be diminished by this suspected lack of credibility of the juror allegedly approached. Each juror knew this; otherwise, they would have "come clean" with the court on the initial interrogation.

In the case of juror Vidrine, here is a juror who was continuing to perpetuate the perjury on which he and all other jurors agreed to commit and suborn, or conversely, a juror, that for some reason, was totally excluded from so obviously an important compact by his fellow jurors.

Perhaps we may never know the true scenario about Vidrine. If further justification was needed for the reversal of the trial court's denial of defendants' motions for new trial, Vidrine's ostracization is apropos.

The possibility of Vidrine's involvement with the improper jury contact is addressed in the indictment of June 3, 1987, of defendant, Fryar.

Paragraph 3 of Count I, paragraph 3 of Count 2 and Count 4 and Count 5 all allege at least attempts at bribing jurors Vidrine and Ronzartz. Neither session of the judge's interrogation of the jurors after the verdict in this case produced even an inkling that there was evidence of improper contact with jurors other than Terracina. Regardless of the legal standards employed by the trial court to rehabilitate the jury in this case, the substantial inferences of prejudice which are apparent from the factual scenario outlined necessitates that this case be remanded for a new trial.

Regardless of plaintiff's allegations that All American Services Company, Ltd. (All American) was established as a "dummy" corporation by Fryar and others to further the alleged securities fraud scheme upon the plaintiffs, All American was entitled to a non-prejudicial consideration of its defense to the plaintiff's claims. That right, embodied in the Seventh Amendment to the United States Constitution is without a doubt overshadowed by the events surrounding the jury's deliberations in this case. Considering that a plausible resolution and reconciliation of what actually occurred with this jury continues to allude all concerned, it was error for the trial court to deny defendant's motions for new trial.

This court and other federal appellate courts have reversed other jury verdicts and remanded those cases for new trials in far less serious cases that presented evidence of outside influence toward an individual juror or an entire jury. See *Leger v. Westinghouse Electric Corporation*, 483 F.2d 428 (5th Cir. 1973) in which on two or three occasions during a lengthy trial, a representative of the

defendant insurer engaged in conversation with a juror regarding multiple subject matters. There was no evidence that the issues of the litigation were discussed. Nevertheless, this court overturned the jury verdict and remanded for a new trial. *Leger v. Westinghouse, supra,* relies on this court's holding in *United States v. Barfield,* 359 F.2d 120 (5th Cir. 1966) and finds that, ". . . harm is inherent in the deliberate contact or communication between juror and litigant." In *Haley v. Blue Ridge Transfer Company,* 802 F.2d 1532 (4th Cir. 1986), a non-juror, who had been mistakenly placed with the jury in that case, and remained throughout the entire first day of the trial, made prejudicial remarks about a defendant in the case to the real jurors. When the error was discovered, the trial judge questioned the non-juror, but allowed the trial to go to verdict. The Fourth Circuit overturned,

> "It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furtherest extent practicable from extraneous influences that may subvert the fact finding process. Because an impartial jury is obviously the touchstone of a fair trial, (See *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed. 2d 683 (1984)), courts throughout modern history have labored to safeguard sitting juries from improper contacts and advances by third parties." *Haley, supra* at 1535.

The court in *Haley* discusses the rules of *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1982), and *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) in which the United States Supreme Court recognizes as "presumptively prejudicial" any private communications to jurors during trial. Rebutting that

presumption is the burden of the party supporting the jury's verdict, in this case, the plaintiffs. In that jurors Terracina and Teer were discharged by the trial court, and the indictment against Fryar raises questions about the credibility of Vidrine and Ronkartz, the presumption that extrinsic contact with the jurors in this case was prejudicial has not been rebutted, even in light of the trial court's two interrogations of the individual remaining jurors.

An attempt was made to rehabilitate this jury. The trial court attempted to rebut the presumption that the deliberating jurors were prejudiced during the second voir dire of the jurors after they had been interviewed by federal law enforcement officials. Each juror denied that the contact, of which they now admit they were aware, had any effect on their verdict. In response to leading questions by the trial court, more than one juror testified that their verdict would have been the same, "down to the penny". Rule 606(b) of the Federal Rules of Evidence prohibits this type of inquiry into a juror's deliberations or decision. The juror may testify regarding the facts surrounding the alleged outside contact, but not about whether that contact, or the knowledge of that contact influenced their decision. Their testimony, in and of itself, pursuant to Rule 606(b) is incompetent. *Haley, supra* at 1535 and *United States v. Harry Barfield Company, supra,* at 123.

Even if the individual juror's testimony as to the affect any alleged improper outside contact may have had upon them was competent, the inquiry by the trial court came too late. In *Krause v. Rhodes,* 570 F.2d 563 (6th Cir. 1967), cert. den. 435 U.S. 923, 98 S.Ct. 1488 (1978), at least one juror had been threatened on three occasions and pos-

sibly assaulted on another. Even though the trial court never interrogated the threatened juror to determine if he were affected by the incidents, and whether the threats had been discussed with other jurors, the Court of Appeal indicated that only an immediate inquiry into the situation may rebut the prejudicial presumption of extrinsic contact with the juror.

In this case, the trial court became aware of allegations of jury tampering as early as January 9, 1987. Then on January 27, 1987, a secret evidentiary hearing was held in chambers regarding the reliability of the information of outside contact with the jury. As stated, it was not until the day of deliberations and submission of the case to the jury, February 4, 1987, that the trial court sought to ascertain what effect, if any, the alleged outside influence had had on the individual jurors. At that late date, it was impossible to determine whether the jury's verdict was influence by what they had seen and heard.

As a matter of fact, the juror's own testimony during the second interrogation by the trial court reveals an actual prejudice that does not even need to be presumed by this court to order a remand for a new trial. When asked why each individual juror had lied to the court during the first interrogation, the consensus of the jurors, evidenced by their secret agreement to withhold what they knew from the court, was the jury's concern that a mistrial would be granted in this case. This jury had invested a great deal of time in this case, and they did not relish the thought that all the time and effort could be for nothing. But this was not the jury's case. Regardless of the jury's verdict, once it was rendered, that should have ended their involve-

ment. Whatever they decided would affect only the plaintiffs and the defendants. It was presumptuous of this jury to adopt the case as their own, but having done so, the presumption of prejudice becomes irrebutable.

All American had no opportunity to protect itself during the trial from any alleged improper influence on the jury. If the jury was prejudiced toward Fryar in that they had been either improperly contacted or learned of improper outside contact, that prejudice was likely transferred by association to the co-defendants, including All American. *Carson v. Polley,* 689 F.2d 562 (5th Cir. 1982); and *United States v. Hanson,* 544 F.2d 778 (5th Cir. 1970). This is especially true considering that at the trial, and as evidenced by the interrogatories presented to the jury for their verdcit, All American and Fryar were inextricably entwined.

There is no evidence available to any of the defendants or to this court as to why juror Teer was excused. Therefore, it cannot be determined whether or not excusing juror Teer was proper. Juror Teer was not questioned by the court or any of the parties; no evidence was presented by any of the other jurors, or any of the parties as to why juror Teer was not allowed to remain on the jury. Accordingly, it cannot be determined whether or not a "tainted" juror was removed properly, or whether a "fair and impartial juror" was excluded without a legally relevant reason. *United States v. Dumas,* 658 F.2d 411 (5th Cir. 1981); and *United States v. Rodriguez,* 573 F.2d 330 (5th Cir. 1978).

CONCLUSION

For the foregoing reasons, and for the reasons addressed in the original brief of defendant-appellant, Fryar, All American is entitled to reversal of the jury verdict and trial court judgment. Alternatively, a remand of this case for a new trial is required.

CHRIS J. ROY (A LAW CORPORATION)

By: /s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana 71301
(Area 318) 487-9537

CERTIFICATE

I hereby certify that a copy of the above and foregoing Original Brief on behalf of defendant-appellant, All American Services Company, Ltd., has been furnished to all counsel of record herein.

Alexandria, Louisiana this 10th day of December, 1987.

/s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.

EXHIBIT "A"

December 10, 1987

Mr. J. Minos Simon
Attorney at Law
Post Office Box 52116
Lafayette, Louisiana 70505

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

Dear Mr. Simon:

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With kindest regards, I remain

Yours very truly,
Leslie R. Leavoy, Jr.
lhm
enclosure

EXHIBIT "B"

December 10, 1987

Mr. Phillip A. Wittman
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130-3588

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

Dear Mr. Wittmann:

Although I have spoken with you and Ms. Barrasso regarding reimbursement to the plaintiffs by All American of its share of the cost of the transcript on appeal, we have not yet learned the exact amount the plaintiffs paid to the Court Reporter.

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With kindest regards, I remain

Yours very truly,
Leslie R. Leavoy, Jr.
lhm
enclosure

EXHIBIT "C"

December 10, 1987

Mr. D. Mark Bienvenu
Attorney at Law
Post Office Box 3527
Lafayette, Louisiana 70502-3527

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

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Leslie R. Leavoy, Jr.
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